Jurisdictional Statement

81-837

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No.

Supreme Court of the United States

October Term, 1981

CITY OF INDIANOLA, MISSISSIPPI, ET AL.,
Appellants,

VS.

NELSON DOTSON, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
UNDER 28 U.S.C. § 1973c

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Question No. 1

Where the population of a covered municipality on November 1, 1964 was 56 per cent black and 44 per cent white, and where between 1965 and 1967 the municipality made four annexations bringing in ten tracts of land inhabited by both white citizens and black citizens, is it lawful for the Attorney General, exercising authority purportedly vested in him by Section 5 of the Voting Rights Act of 1965,[1] arbitrarily to preclear *only* the black annexations

(a) where all annexations were submitted as a package, as a single change affecting voting,[2]

(b) where they occurred between 14 and 16 years prior to the preclearance submission, and

(c) where the statistical effect of the Attorney General's actions would be an aggregate dilution of white voting strength from *44 per cent* to *35 per cent*?

Question No. 2

Where, in the circumstances described in Question 1, the Attorney General attempts to preclear only black inhabited annexation areas, resulting in an artificial enhancement (for voting purposes only) of the black population in Indianola, Mississippi from 56 per cent to 65 per cent, would the City officials be justified in refusing to enforce for voting purposes any of the post-November 1, 1964 annexations on grounds that to do so would result in an unconstitutional and otherwise unlawful dilution of white voting strength?

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1. 42 U.S.C. §1973c.

2. "Change affecting voting" is a term of art defined in 28 C.F.R. §51.2(b).

Question No. 3

Are white citizens a protected racial group within the scope, meaning and contemplation of Section 5 of the Voting Rights Act of 1965 - particularly where white citizens constitute a minority, numerically and percentage-wise, of the population in the covered municipality?

Question No. 4

Under Section 5 of the Voting Rights Act of 1965, can a covered municipality submit for preclearance, as a package, as *a single change affecting voting,* the annexation of ten tracts of land taken into the City limits on four separate occasions (between May 25, 1965 and July 24, 1967), so that the Attorney General's only alternatives are preclearance of all or preclearance of note?

OR

Can the Attorney General, upon receipt of such a Section 5 preclearance submission, ignore the "package" basis thereof and preclear some of the annexations and object to others? In other words, can the Attorney General preclear a change which has not been submitted?

Question No. 5

Once preclearance has been given to a particular change affecting voting, is there anything in Section 5 of the Voting Rights Act of 1965 that requires the covered municipality to proceed to enforce the change?

OR

Is the decision to enforce or not determine wholly by reference to applicable and controlling rules of law extraneous to and wholly outside of Section 5 or the Voting Rights Act?

INTRODUCTION

We suggest, with respect, that this Court will be shocked at what the District Court has done. A strained and wooden reading of Section 5 has done violence to the spirit and purposes of Voting Rights Act, along with the Fourteenth and Fifteenth Amendments.

The District Court has taken Section 5, a defensive shield against discriminatory changes affecting voting, and used it to effect an invidious discrimination. The District Court has mandated that the small town of Indianola, Mississippi, dilute the voting strength of its white minority from 44 per cent to 35 per cent.

The City officials - Appellant here - have striven valiantly to restore the relative voting strength of black and white citizens to November 1, 1964[3] levels - 56 per cent black and 44 per cent white - before the fall 1981 elections. That restoration is what - *and all* - Appellants ask.

The District Court's actions have in no way been mandated by prior decisions of this Court. Rather those actions are wholly inconsistent with this Court's prior interpretations of Section 5. In fact, this appeal presents heretofore undecided questions under Section 5, intertwined with hitherto undecided questions under the Fourteenth and Fifteenth Amendments. A sensitive and correct resolution of these questions is essential to the just stewardship of our country's most precious right - the right to vote.

The case should be brought here for plenary review.

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3. November 1, 1964 is the effective date of the Voting Rights Act of 1965. Pub. L. 89-110, Title I, §5, 79 Stat. 439.

PARTIES

The parties hereto, listed in accordance with Rule 15.1(b), are:

The following parties were Defendants below and are Appellants here:

(1) Philip Fratesi, individually[4] and in his official capacity as Mayor of the City of Indianola, Mississippi;

(2) Gary L. Austin, individually and in his official capacity as a member of the Board of Aldermen of the City of Indianola, Mississippi;

(3) Charlotte H. Buchanan, individually and in her official capacity as a member of the Board of Aldermen of the City of Indianola, Mississippi;

(4) G. Clarke Johnson, individually and in his official capacity as a member of the Board of Aldermen of the City of Indianola, Mississippi;

(5) W. Harold Manning, individually and in his official capacity as a member of the Board of Aldermen of the City of Indianola, Mississippi;

(6) James D. Robinson, individually and in his official capacity as a member of the Board of Aldermen of the City of Indianola, Mississippi; and

(7) The City of Indianola, Mississippi, an incorporated municipality in the State of Mississippi.

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4. The Defendants proceed here in their individual capacities. If this appeal should be successful, any elections held in accordance with the District Court's order of September 2, 1981, will have to be vacated. But this could come after these Defendants leave office on January 1, 1982.

The following persons are Plaintiffs in the proceedings below and are Appellees here:

(a) Nelson Dotson;

(b) Ruthie Mae Motion;

(c) Edna Battle;

(d) Myron Harris;

(e) Alberta Matthews;

(f) John Richardson;

(g) Robert Kent;

(h) Rosianna Hazlett;

(i) Dudley Grace;

(j) Charlie Tillis;

(k) John Chance;

(l) Frank Walker;

(m) Girter Walker;

(n) William Steen;

(o) Belton Johnson;

(p) Ellis Wyms.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

Pursuant to Rule 15.1(d), Appellants list the following opinions and judgments which have heretofore been rendered by the United States District Court for the Northern District of Mississippi:

1.

On January 26, 1981, the United States District Court for the Northern District of Mississippi, per Chief Judge William C. Keady, released its Memorandum of Decision calling for the convening of a Three Judge District Court, pursuant to 28 U.S.C. §2284 and 42 U.S.C. §1973c. That Memorandum of Decision is reproduced here as Appendix C.

2.

On January 31, 1981, Honorable James P. Coleman, Chief Judge, United States Court of Appeals for the Fifth Circuit, entered an Order designating Honorable Charles Clark, Circuit Judge, Honorable William C. Keady, Chief Judge, United States District Court and Honorable L. T. Senter, Jr., United States District Judge, as the members of the Three Judge District Court. That Order is reproduced here as Appendix D.

3.

On May 13, 1981, the United States District Court for the Northern District of Mississippi, constituted in accordance with the aforesaid Order of January 31, 1981, released its Memorandum Opinion which, *inter alia*, held that persons residing in ten tracts of land annexed by the City of Indianola on four separate occasions between 1965 and 1967 could not vote because those annexations constituted changes affecting voting which had not been precleared by the Attorney General of the United States in conformity with Section 5 of the Voting Rights Act of 1965. Absent future preclearance, Indianola was enjoined from allowing persons residing in the annexed areas to vote in municipal elections. This Opinion is reported as *Dotson v. City of Indianola*, 514 F. Supp. 397 (N.D. Miss. 1981), and is reproduced here as Appendix E.

4.

On the same date, May 13, 1981, the District Court entered its Judgment implementing the aforesaid Memorandum Opinion of May 13, 1981. This Judgment is unreported and is reproduced here as Appendix F.

5.

On September 2, 1981, the Three Judge District Court released its Memorandum of Decision, holding, *inter alia*, that Indianola was required to hold its fall 1981 elections with the City's population arbitrarily and artificially constituted (for voting purposes only) at 65.1 per cent black persons and 34.9 per cent white persons. This decision, *from which this appeal is taken*, is as of this date unreported and is reproduced here as Appendix A.

6.

On the same date, September 2, 1981, the District Court entered a Judgment in the form of an injunction requiring, mandating and implementing the aforesaid Memorandum of Decisions of September 2, 1981. That Judgment, *from which this appeal* is taken, is unreported and is reproduced here as Appendix B.

GROUNDS FOR JURISDICTION IN THIS COURT

Pursuant to Rule 15.1(e), the nature of these proceedings is as follows:

(i) This action has been brought by Plaintiffs [Appellees here] seeking, *inter alia*, to enjoin the City of Indianola from enforcing changes affecting voting until those changes have been precleared as required by Section 5 of the Voting Rights Act of 1965.[5] A special Three Judge

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5. Count I of the Complaint is that described above. Counts II-V, not directly of concern here, invoke Section 5 along with the Thirteenth, Fourteenth and Fifteenth Amendments as Plaintiffs seek a mandatory injunction ordering Indianola to annex substantially all black areas south of town

The May 13, 1981 Opinion and Judgment (See Appendices E and F) constitute a final judgment on the merits of Count I of Plaintiffs' Complaint. The Opinion (Appendix A) and Judgment (Appendix B) appealed from here constitute a reinterpretation and, Appellants say, a radical alteration of the May 13 decision.

District Court was constituted in accordance with 42 U.S.C. §1973c which provides, *inter alia*, as follows:

> "any action under this section shall be heard and determined by a Court of Three Judges in accordance with the provisions of Section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

The September 2, 1981 Judgment of the Three Judge District Court, review of which is sought here, interprets and then enforces (unlawfully, Appellants suggest) a Section 5 preclearance ruling of the Attorney General and orders Indianola to allow all black annexees to vote - *while excluding 1091 taxpaying* white citizens[6] - thus arbitrarily constituting the City 65 per cent black and mandating an unconstitutional and unlawful dilution of white voting strength.

(ii) The injunction denominated Judgment sought to be reviewed here was entered by the Three Judge District Court on September 2, 1981. Notice of Appeal to this Court was served on September 9, 1981 and filed on September 11, 1981. [See Appendix J]

(iii) Jurisdiction of this appeal is vested in this Court in accordance with 42 U.S.C. §1973c quoted above and providing, *inter alia*, that . . . "and any appeal shall lie to the Supreme Court".

Comparable cases in which this Court has exercised appellate jurisdiction include *Allen v. Board of Elections*, 393 U.S. 544, 560-563 (1969); *Perkins v. Matthews*, 400

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6. The proper context for the population numbers used here is:

(a) According to 1960 census, Indianola had 6714 citizens, 56 per cent of whom were black;

(b) According to the September 2, 1981 injunction, the City (for voting purposes) has only 6149 citizens, over 65 per cent of whom are black;

(c) 1901 taxpaying white citizens have been disenfranchised.

U.S. 379 (1971); *Morris v. Gressette*, 432 U.S. 491 (1977); and *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32 (1978).

The Fourteenth and Fifteenth Amendments questions presented are so intertwined with the Section 5 questions that they fall within the pendent appellate jurisdiction of the Court.

CONSTITUTIONAL PROVISIONS INVOLVED

(1) The Equal Protection Clause, Constitution of the United States, Amendment XIV, Section 1. [See Appendix G]

(2) The Fifteenth Amendment: Constitution of the United States, Amendment XV. [See Appendix H]

STATUTES INVOLVED

(1) Voting Rights Act of 1965, Section 5; Title 28 U.S.C. §1973c. [See Appendix I]

STATEMENT OF THE CASE

As required by Rule 15.1(g), the following is the statement of the case.

Prior to November 1, 1964 [the effective date of Section 5 of the Voting Rights Act of 1965], the City of Indianola, Mississippi consisted of 6714 people. Of these, 3764, or 56 per cent, were non-white (black). The minority white population in Indianola at the time numbered 2950, being 44 per cent of the whole.

Between May 25, 1965 and July 24, 1967, the City of Indianola brought into its corporate limits ten tracts of

land in four separate annexation proceedings.[7] The City of Indianola did not preclear any of the 1965-1967 annexations.[8] According to the 1980 census figures, these annexations cumulatively added 1901 white and 1323 nonwhites to the City.[9] The overall effect was to alter the City's racial make-up so that in 1980 the white population then constituted a 50.3 per cent majority while the nonwhite population was reduced to 49.7 per cent.

On October 1, 1980, Plaintiffs, Nelson Dotson, et al., filed their action in the United States District Court for the Northern District of Mississippi, Greenville Division, seeking, *inter alia*, to enjoin the City from allowing persons residing in areas annexed between 1965 and 1967 from voting. Plaintiffs invoked Section 5 of the Voting Rights Act of 1965, and the fact that these annexations were changes affecting voting which had not been precleared. After a hearing before a Three Judge District Court, the Court released a Judgment on May 13, 1981, which provided, *inter alia*, as follows:

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7. These annexations were all completed before the decision in *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Prior to *Allen*, the Court can judicially note that no one was submitting annexations to the Attorney General as changes affecting voting requiring preclearance under Section 5.

8. None of the incumbent City officials - the Mayor and Board of Aldermen who are defendants below and Appellants here - had any knowledge or reason to know that these annexations had not been precleared. None of the attorneys representing the City of Indianola had any knowledge or reason to know that the annexations had not been precleared. Most of the City officials and the City attorney holding office at the time of the annexations were made are all dead. We emphasize that prior to the *Allen* case in 1969, it was not widely perceived that annexations were changes affecting voting within the preclearance requirement of Section 5.

9. The population of these annexed areas at the time the annexations were made is unknown. These areas were outside the City at the time of the 1960 Census and, insofar as we are aware, there are no Sunflower County block data available for these annexed areas.

> "The legal boundary lines of the City of Indianola, Mississippi, shall be, for the purpose of conducting municipal elections, those in force and effect prior to November 1, 1964; provided, that the City of Indianola may enforce in such elections any subsequent annexations which are properly precleared in accordance with provisions of said Section 5 of the Voting Rights Act." [Emphasis added] Appendix F.

See *Dotson v. City of Indianola*, 514 F. Supp. 397 (N.D. Miss. 1981), reproduced here as Appendix E.

Effective May 1, 1981,[10] the present City administration [Defendants below, Appellants here], submitted to the Attorney General for preclearance, as a single change affecting voting, the annexation of the ten tracts brought into the City between 1965 and[11] 1967.

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10. The City's original preclearance submission was dated March 6, 1981. It was thereafter supplemented. For purposes of triggering the running of the sixty day period, the Attorney General deemed the submission complete on May 1, 1981.

11. We are not the first to think that multiple annexations should be submitted for preclearance *en masse* - particularly when a substantial period of time has elapsed since the annexations were made. The same thing was done in Rome, Georgia case. *City of Rome v. United States*, 472 F. Supp. 221, 247 (D.D.C. 1979), affirmed 446 U.S. 156, 186, 100 S.Ct. 1548, 1567, 64 L.Ed.2d 119, 145 (1980). *City of Rome* involved an attack on 13 separate annexations. First, the District Court held that the annexations should be viewed "as a single and unified whole". 472 F. Supp. at 247. The Court correctly observed that it was obliged to consider the 13 annexations from the vantage point of their

> indivisible cumulative impact on black voting strength in *Rome*. 472 F. Supp at 247.

The Court then cited the delay in submitting the annexations for preclearance as a factor rendering package consideration "eminently fair". 472 F. Supp. at 247.

On review, Mr. Justice Marshall's sense of common sense was not offended by the package consideration of the annexations. First, he noted that Rome's delay

> placed the annexations before the District Court *as a group*, 446 U.S. at 186, 64 L.Ed.2d at 145. [Emphasis added]

(Continued on following page)

On June 1, 1981, the Attorney General released its preclearance letter. The substance and contents of that letter cannot help but offend the sensibilities of any person possessing a sense of justice. The Attorney General attempted to reach out and preclear the 1966 and 1967 annexations only - the ones inhabited by black persons. The June 1, 1981 preclearance letter interposed an objection to the May 25, 1965 annexation (five tracts of land inhabited by whites only).

The inclusion of the territories annexed in 1966 and 1967 in the City, while excluding the May 1965 annexees would, according to the 1980 Census figures, add to pre-November 1, 1964 Indianola 1323 non-white (black) persons. This blatant racial gerrymandering would have the net effect of arbitrarily redrawing the City's boundaries for voting purposes so that it is now a City of 6149 persons, with non-whites constituting a 35 per cent minority.[12] It would also have the effect of leaving 1901 white persons in the posture of being taxpaying citizens of Indianola since 1965 but having no right to vote. No black persons are placed in that posture.

Footnote continued—

Justice Marshall, speaking for the Court, then held

> the Court was correct in concluding that the *cumulative effect* of the 13 annexations *must* be examined . . . . 446 U.S. at 186, 64 L.Ed.2d at 145. [Emphasis added]

Though *Rome* indicates that Rome had made 60 annexations over the 10 year period in issue, nothing in the opinion gives a clue concerning the population makeup of the other 47 - or whether anyone lived there at all. For aught that appears, these were added tax base annexations.

12. This action began with black plaintiffs complaining that black Indianola had had their voting strength diluted. They are strangely silent when white voting strength in Indianola is diluted from 43.9 per cent to 34.9 per cent.

Immediately following the June 1, 1981 preclearance letter, the City of Indianola announced its intention to annex additional black populated areas so that, in conjunction with the white areas not precleared, the City's racial balance would be *restored to November 1, 1964 levels* - approximately 56 per cent black and approximately 44 per cent white. The City further announced, that until these new annexations could be completed and preclearance obtained, it considered that the November 1, 1964 boundaries were in effect - so that no one's voting strength would be diluted from the levels prevailing that day. The City began to move as rapidly as possible to complete new annexations (a) so that all persons annexed in good faith between 1965 and 1967 would be restored to full citizenship including full enfranchisement and (b) so that an additional number of black persons would be brought into the community, again, so that there would be no dilution of either black voting strength or white voting strength below November 1, 1964 levels.[13]

On August 5, 1981, Plaintiffs served a Motion which led to the entry of the Judgment from which this appeal has been taken. In that Motion, Plaintiffs sought, *inter alia,* an injunction requiring that the fall elections in Indianola be held with the boundaries fixed to include the pre-November 1, 1964 boundaries, plus the areas annexed between 1965 and 1967. Plaintiffs asked for elections with the City 65 per cent black and 34 per cent white. In other words, Plaintiffs asked that the 1981 elections be held with white voting strength diluted from 44 per cent on November 1, 1964 to 35 per cent today.

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13. Plantiffs, euphoric at their windfall achievement of a gerrymandered city that is 65 per cent black, have sought to obstruct these efforts.

Thereafter, on August 13, 1981, Defendants filed a Cross-Motion asking, *inter alia*

(a) for a stay of the elections until the new annexation could be consummated[14] and preclearance obtained - the net effect of which will ultimately be to reconstitute the City limits so that the overall population of 9441, consisting of 5394 blacks (57.1 per cent) and 4047 whites (42.9 per cent). This will restore the racial makeup of the City on November 1, 1964, with a slight enhancement of black percentage.

After the hearing, the Three Judge District Court on September 2, 1981, entered *the injunction appealed from here* providing and holding, *inter alia*, that

(a) the Three Judge District Court had the jurisdiction and power to interpret the June 1, 1981 preclearance ruling of the Attorney General of the United States and via injunction to enforce that interpretation.[15]

(b) holding, *sub silentio*, that there was no violation of the constitutional rights of white citizens of Indianola by virtue of the dilution of their voting strength from 43.9 per cent as of November 1, 1964 to 34.9 per cent in 1981,

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14. The annexation proceedings are pending before the Chancery Court of Sunflower County, Mississippi. A hearing on the merits is scheduled November 20, 1981.

15. The District Court is dead wrong when it accuses Appellants, Defendants below, of seeking judicial review of the Attorney General's preclearance determination - allegedly in violation of the rule announced in *Morris v. Gressette*, 432 U.S. 491 (1977). The September 2, 1981 order, review of which is sought here, resulted from Plaintiffs' motion seeking (a) an interpretation of the June 1, 1981 preclearance letter and (b) enforcement of that interpretation. Appellants object (a) to the District Court's power to make an interpretive ruling regarding the preclearance letter - on *Morris* grounds and (b) to the correctness of that interpretation - on grounds stated extensively herein.

(c) holding, *sub silentio,* but unmistakably that the white citizens of Indianola, Mississippi, even though they are in fact a numerical minority, are not a racial group entitled to protection under the Voting Rights Act of 1965 or under the Fourteenth or Fifteenth Amendments to the Constitution of the United States,

(d) holding that, even though Indianola effectively conditioned its May 1, 1981 preclearance submission so that all ten tracts annexed (on four separate occasions) were submitted a single change affecting voting, the Attorney General had the power to sever the submission and preclear the black areas annexed while rejecting the white areas, and that black Plaintiffs were entitled to the District Court's injunction mandating enforcement of the Attorney General's preclearance ruling,

(e) holding, in effect, that once a change affecting voting has been precleared under Section 5 of the Voting Right Act of 1965, the submitting authority must enforce the change; that is, that the submitting authority does not have the option of non-enforcement of the change or of returning to voting practices and procedures existing November 1, 1964, or before submission, and

(f) holding, in effect, that the District Court does not have the power (even as an interim measure pending preclearance), either to stay the 1981 elections or order temporary elections held with racial percentages the same as those existing on November 1, 1964.

REASONS FOR GRANTING PLENARY REVIEW

A. Introduction

There are important reasons why this voting rights case should be brought here for plenary review.

(1) The case presents hitherto unresolved policy considerations: Are white persons one of the racial classes protected by Section 5? Particularly, where white persons are numerically *the minority group* in the covered municipality?

(2) It presents technical questions concerning the structure and functioning of Section 5 - again hitherto undecided

(a) when a change affecting voting is precleared, does Section 5 require that the submitting authority enforce it?

(b) May a submitting authority submit for preclearance a number of annexations as a package, a single change affecting voting?

(c) Where such a package submission has been made, may the Attorney General do anything other than preclear the package or reject to it in its entirety?

(3) The case also asks this Court to decide whether a Three Judge District Court may mandatorily order enforcement of a precleared change affecting voting enforced, and, if so, what are the ground rules for such proceedings?

(4) May a Three Judge District Court, under the guise of enforcing Section 5 and interpreting an Attorney General's preclearance ruling, order a City racially gerry-

mandered to remove 1901 taxpaying white citizens—diluting the voting strength of the white *minority* from 44 per cent to 35 per cent?

But there is something here beyond the interesting questions presented. The District Court has ordered the 1981 elections held on a basis that is intuitively unfair, unjust. The Appellant City officials have acted in complete good faith to restore the racial balance to the point - a 56 per cent black majority - where it was black on November 1, 1964.

These City officials had absolutely nothing to do with the annexations of 1965-1967. They have done nothing to deprive a single black person of any voting right - constitutional or statutory variety. And for their efforts, they have been slapped with a District Court injunction which mandates substantial violation of rights secured to white citizens, as well as ignoring fundamental interworkings of the preclearance process.

Justice demands - at the very least - plenary review of such an incongruous enforcement of Section 5 of the Voting Rights Act.

B. Dilution of Voting Strength of White Citizens Is a Violation of Both Section 5 and the Fifteenth Amendment

Two points deserve further emphasis. First, what the District Court has done with its order of September 2, 1981 is to violate two fundamental ethical premises of our society. These premises are:

A.

All persons have a constitutionally protected right that the strength of their vote will not be diluted by arbitrarily

drawn electoral district boundary lines. *Reynolds v. Sims*, 377 U.S. 533, 561-562, 568 (1964); *Perkins v. Matthews*, 400 U.S. 379, 388 (1971).

B.

A citizen does not have to be a member of any particular racial group in order to have his right to vote respected. White persons have the same constitutional and legal immunity against the abridgement of, or dilution of, their right to vote on account of race and color as do black persons. *United Jewish Organizations of Williamsburgh, Inc. v. Wilson*, 510 F.2d 512, 521-522 (2d Cir. 1975), affirmed sub nom.; *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (See particularly Stewart, J., concurring, 430 U.S. at 179-180). See also *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Carter v. Gallagher*, 435 F.2d 315, 325 (8th Cir. 1971).

The District Court's decision has placed these premises in doubt. After plenary review, this Court should reestablish them - and give a loud and clear signal that invidious discrimination in voting is morally, constitutionally and legally intolerable, regardless of the skin color of the racial group discriminated against, and no matter how exhalted be the station of the authors of the discrimination.

C. The District Court Has Ordered Blatant Racial Gerrymandering

Suppose that the City of Indianola arbitrarily deannexed a portion of its corporate territory - and thereby excluded from the City 1901 black citizens. What then would happen if black Indianolans brought an action to void the deannexations on grounds of dilution of their voting

strength? Without question, the Court would cite *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) and hold for plaintiffs.

In a manner starkly real to almost 2000 Indianolans, the District Court has joined with the Attorney General *to do precisely the same thing.* By virtue of the preclearance ruling of June 1, 1981, as construed, interpreted and enforced by the District Court, 1901 white citizens have been removed from the City. As indicated elsewhere, white voting strength is reduced to 34 per cent, down from its November 1, 1964 level of 44 per cent.

Blatant racial gerrymandering is constitutionally and ethically intolerable. This is so whether the targets of the gerrymandering are black persons, or white persons, or Mexican-Americans, or whoever. This is also true whether the gerrymandering occurs as a result of an act of the State legislature, an act of municipality, or the actions of the District Court and/or the Attorney General. What has been done here is at racial variance with the letter, spirit and purpose of *Gomillion v. Lightfoot.* After plenary review, this Court should reverse.

CONCLUSION

The City of Indianola, Mississippi, et al., Appellants here respectfully urge the Court to note probable jurisdiction and set this case for plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JAMES L. ROBERTSON, one of the Attorneys of Record for Appellants, THE CITY OF INDIANOLA, MISSISSIPPI, ET AL., hereby certify that I have mailed, postage prepaid, a true and correct copy of the above and foregoing Jurisdictional Statement, to the following, to-wit:

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This the 2nd day of November, 1981.

JAMES L. ROBERTSON

Appendix

APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
GREENVILLE DIVISION

NO. GC 80-220-WK-O

NELSON DOTSON, ET AL, Plaintiffs

v.

CITY OF INDIANOLA, MISSISSIPPI, ET AL, Defendants

(September 2, 1981)

MEMORANDUM OF DECISION

Before CHARLES CLARK, Circuit Judge; KEADY, Chief Judge; and SENTER, District Judge

WILLIAM C. KEADY, District Judge:

On May 13, 1981, this three-judge court determined that the legal boundary lines of the City of Indianola, Mississippi, were, for the purpose of conducting municipal elections, those in force and effect prior to November 1, 1964, until such time as annexations made subsequent to that date were properly precleared in accordance with Section 5 of the Voting Rights Act of 1965 as amended, 42 USC § 1971, et seq. Dotson v. City of Indianola, 514 F. Supp. 397 (N.D. Miss. 1981) (three-judge court). It was found that on May 25, 1965, May 4, 1966, September 2, 1966, and July 14, 1967, Indianola had annexed territories which

brought into the municipality new eligible voters and which had not been precleared. At the time of our previous hearing, a submission of the annexations was pending in the office of the Attorney General of the United States.

Plaintiffs have now filed motions seeking to hold the defendant city officials in contempt for not complying with our order because of their actions following the determination on June 1, 1981, of the Attorney General or, alternatively, to declare the legal boundaries and establish election procedures of the municipality for the holding of the primary election scheduled on November 10, 1981 and the general election on December 8, 1981. On August 7, District Judge William C. Keady, to whom the three-judge panel had remanded the case for further disposition, determined that the issues raised by plaintiffs' present motions should be submitted to the three-judge court for decision in view of the Section 5 claims inherent in or closely connected to the motions. On August 15, the defendants countered by moving for an order to postpone the 1981 municipal elections or to declare temporary election boundaries as proposed by them. The three-judge court having ancillary jurisdiction to rule upon defendants' motions in conjunction with the relief sought by plaintiff, see, Weintraub v. Hanrahan, 435 F. 2d 461, 463 (7 Cir. 1970), we proceed to adjudicate all issues. For reasons which follow, the court determines that plaintiffs' motion to establish legal boundaries and procedures for the conduct of Indianola's 1981 municipal elections should be sustained, and that defendants not be held in contempt; moreover, that defendants' alternative motion be denied in both aspects. To alleviate any further misunderstandings concerning city elections, the order accompanying this memorandum shall clearly set forth the territorial bound-

aries and procedures for the conduct of the 1981 municipal elections of mayor and aldermen, as well as the special duties governing Indianola officials.

On August 19, Judge Keady conducted an evidentiary hearing at which the parties appeared with counsel and offered various documents, affidavits, and live testimony, which has been transcribed and submitted to us, along with legal memoranda. Pursuant to Rule 52(a), F. R. Civ. P., we find from the evidence adduced as follows:

FACTS

(a) *Sequence of Events*

On October 2, 1975, J. Stanley Pottinger, Assistant United States Attorney General for the Civil Rights Division, wrote to Frank Crosthwait, then City Attorney of Indianola. Pottinger informed Crosthwait that the Department of Justice had been notified that the City had made several annexations to its city limits since November 1, 1964, and that Section 5 of the Voting Rights Act required that such annexations either be submitted to the Attorney General for review or be the subject of a declaratory judgment action in the United States District Court for the District of Columbia before implementation. On November 10, 1975, Crosthwait responded to the Pottinger letter and acknowledged annexations of May 4, 1966, September 2, 1966, and July 14, 1967, but did not mention the May 25, 1965 annexation. Although Pottinger requested him to supply the information required by 28 CFR § 51.1 *et seq.*, Crosthwait merely cited the location of the minute entries in the state court records and noted that he would "obtain the voting changes, if any, for [Pottinger's] review." On December 23, 1975, Pottinger again requested from Crosthwait certain informa-

tion concerning the disclosed 1966-67 annexations. The City did not respond to this request.

On August 21, 1980, the Department of Justice wrote to Dean Belk, present City Attorney, and noted that no response had been received to its December 1975 request for information. The Department also notified Belk that it had learned of the May 1965 annexation, and again informed the City that all annexations were legally unenforceable until preclearance was obtained and cited the applicable regulations regarding submission of voting changes. Belk was requested to inform the Department of the City's intentions regarding preclearance within twenty days of receipt of the letter.[1]

By letter dated March 6, 1981, Mayor Philip Fratesi provided the information which the Department first requested in Pottinger's December 23, 1975, communication. Pertinent information for each annexation was set forth. James L. Robertson, special counsel for Indianola, stated by affidavit that he and Belk on March 11 met with Department of Justice officials at Washington, D. C. Robertson stated that during the meeting, he asked Barry Weinberg, Chief of the Section 5 Unit, whether all annexations would be treated as a package. According to Robertson, Weinberg "made a response to the clear effect that he saw no reason why they shouldn't all be treated as a package and that in fact it seemed only sensible to so treat these annexations." As a follow-up to that conversation, Robertson on March 17 wrote Weinberg stating:

> [W]e want to be sure it is clear that the City of Indianola is submitting the four annexations between 1965 and 1967 for pre-clearance as a unit. We think this is consistent with the tenor of the comments from

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1. The present action was commenced on October 1, 1980.

> you and other persons present. We do not seek pre-clearance of any of the four annexations individually. We seek pre-clearance of all four as a package, or none at all. In the event that your office declines pre-clearance of any one or more of the annexations, the other requests for pre-clearance are automatically withdrawn.[2]

The mayor and aldermen at no time adopted a resolution or placed an order on the official minutes declaring the conditions or terms of the submission. Some of the defendant officials, however, were made aware of Robertson's position at this stage of the proceedings and interposed no objection; other aldermen had no knowledge that the submission was being conditionally made. In his affidavit, Robertson candidly acknowledged that he was solely responsible for the "package preclearance submission" and that his decision to submit the annexations as a package was based on three reasons: (1) since so much time had elapsed since the annexations, it seemed the only sensible way to submit the changes; (2) he wanted to assure that preclearance of any future annexations would be judged by viewing the racial population breakdown as it existed in 1964; and (3) he foresaw that "in spite of the fact that doing such would offend the sensibilities of any person having a sense of justice, someone might later try to 'approve' the 1966 and 1967 annexations, while rejecting the 1965 annexation."

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2. The court was not advised of the contents of this letter until the receipt of Robertson's letter of June 5, 1981. Hence, Indianola's representation to the three-judge panel that it had submitted the annexations to the Attorney General for preclearance failed to state that the City was proposing to withdraw the request for preclearance if any one or more of the annexations were objected to by the Attorney General.

Indianola's submission was not actually completed until May 1, when the City provided additional requested information.

On June 1, James P. Turner, Acting Assistant Attorney General, Civil Rights Division, informed Belk that "[t]he Attorney General does not interpose any objections" to the May 4, 1966, September 2, 1966, and July 14, 1967, annexations. The Department did, however, interpose an objection to the 1965 annexation since the white population added to the City at that time diluted then black voting strength by 3.8%. Looking at present voting populations, the Department noted that the "1,991 whites now residing in those annexed areas have caused a present dilution of 16.1 percent in the 1965 pre-annexation city and even when the post 1965 annexations of 1966 and 1967 are included within the city the present effects of the 1965 annexation amount to a 10.7 percent dilution of the black population." Turner's letter stated:

> In limiting our objection to the 1965 annexation, we are not unmindful of the city's request that we preclear none of the annexations here under submission unless we preclear them all. However, the Attorney General's responsibility and authority under Section 5 is to object to those voting changes which are not shown to be nondiscriminatory in purpose or effect. Since our analysis here has found that showing lacking only with respect to the 1965 annexation, that is the only annexation concerning which we have authority to object.

Turner concluded by stating that unless and until Indianola received either a withdrawal of the Attorney General's objection or a favorable declaratory judgment in the District of Columbia court, the 1965 annexation was legally unenforceable insofar as it affects voting.

On June 5, Robertson wrote Judge Keady, with advice to opposing counsel, that "[t]he four 1965-1967 annexations were submitted to the Department of Justice for preclearance *as a package*" (emphasis in original). Quoting his March 17 letter to Weinberg, Robertson noted that prior to the June 1 letter from the Department, "no one with USDJ had interposed any objection to the all-or-none basis on which the annexations were submitted. That municipalities have the power to amend or withdraw Section 5 submissions is almost too obvious to require a statement." The letter concluded by summarizing the City's position.

> [C]ounsel for Indianola understand their present posture to be this: By the Order of May 13, 1981, the City is enjoined from allowing anyone residing in the 1965-67 annexed areas to vote until such time as those annexations have been precleared. USDJ's letter of June 2, [sic] 1981 triggered an automatic witndrawal of all submissions. Therefore, none have been precleared. Until such time as either (a) the Court's Order of May 13, 1981 may be modified or (b) the United States Department of Justice preclears something Indianola submits, the City understands that the residents of the four annexed areas have no right to vote.

On June 11, Robertson wrote Turner, noting that the Department's objection to only the 1965 annexation was "in spite of [Department's] awareness of the fact that Indianola had submitted all four annexations for preclearance as a package, i.e., that, even though the four annexations had been accomplished on four separate dates, because so much time had passed, the only sensible and realistic approach was to treat all as a single annexation." Robertson continued as follows:

[U]ntil receipt of your June 1, 1981 letter, we had no information that your office in any way took exception to the all-or-none basis of this submission, which I outlined in clear and unmistakable language in my March 17 letter. And, in fact, we do not read your June 1 letter to take exception to the packaged basis of our submission. We understand you to be stating that you have responsibility and authority under Section 5 only to object to voting changes which are not shown to be nondiscriminatory in purpose or effect and that, in your view, the 1965 authority [sic] is the only one of the four concerning which you have authority to object. We assume you now agree that, by virtue of that objection having been made, in accordance with the clear language of my letter of March 17, 1981, your failure to preclear the May 1965 annexation worked an automatic withdrawal of the request for preclearance on all four of the 1965-1967 annexations. Hence, none have been precleared. . . . [T]he City understands that at this time no one residing in the areas annexed between 1965 and 1967 may lawfully be allowed to vote in city elections. This will remain the situation until Indianola makes a new submission and obtains preclearance.

. . . [W]e have no intention of leaving the matter in its present state. To do so would be irresponsible, inconsistent with the spirit and purpose of the Voting Rights Act, and contrary to the best interest of the City of Indianola. It is our intention to devise a plan for the enlargement of the boundaries of the city beyond those existing November 1, 1964 which you will find yourselves able to approve consistent with your obligation under Section 5. Mindfull [sic] of the fact that the elections are scheduled this fall, we expect to move with some dispatch in this matter.

On August 6 the Department responded in part as follows:

> We were aware of the city's request that the four annexations be considered as a package and that an objection to any one of the four be considered a withdrawal of the Section 5 submission of the other three annexations. However, as explained in our letter of June 1, 1981, the Attorney General has a responsibility to object only to those changes which have a discriminatory purpose or effect. In addition, Section 51.23 of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended,[3] provides for the withdrawal of a submission only under certain circumstances which in this instance have not been met. Thus, all of the submitted voting changes were subjected to Section 5 review and the voting changes occasioned by the 1966 and 1967 annexations were found to satisfy the Section 5 test.

On August 10, the mayor and board of aldermen adopted an annexation ordinance requesting the Chancery Court of Sunflower County to approve an annexation of territory adjoining the southern segment of the present corporate limits, consisting of residential areas inhabited solely by blacks. A hearing on the City's petition in chancery court has been scheduled for September 18. If approved, the City proposes to submit the annexations to

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3. That provision provides:

> If while a submission is pending the submitted change is repealed, altered, or declared invalid or otherwise becomes unenforceable, the jurisdiction may withdraw the submission. In other circumstances, a jurisdiction may withdraw a submission only if it shows good cause for such withdrawal.

46 Fed. Reg. 875 (1981) (to be codified in 28 CFR § 51.23).

the Department for preclearance, apparently once more as a package.[4]

(b) *Statistical Effect of the Annexations*

In the absence of official census data reflecting Indianola's racial composition on November 1, 1964, we must assume that the population did not change from 1960, when, according to government census data, the City had a total population of 6,714. Whites were then in the minority with 2,950 (43.9%), while the City had a nonwhite population of 3,764 (56.0%). By the time of the 1980 official census, only 4,826 persons resided within the corporate boundaries as existed on November 1, 1964, although the racial composition of this "inner-city" was approximately the same in 1980 as it was in 1964—there were 2,146 whites (44.5%) and 2,680 non-whites (55.5%).

By 1980 census figures, the May 15, 1965 annexation added 1,901 whites and no nonwhites. The later annexations added 1,323 nonwhites and no whites.[5] Thus, if only those persons residing within the "inner-city" plus the areas included within the 1966 and 1967 annexations are considered, the population for voting purposes would be 6,149 persons, of whom 2,146 are white (34.9%) and 4.003 are nonwhites (65.1%), which would result in a 9.1% increase in nonwhites since November 1, 1964. However, if the 1965 annexation objected to by the Civil Rights

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4. Counsel for plaintiffs advise the court that they propose to contest the chancery court petition. Presumably, they will also challenge further preclearance submissions to the Civil Rights Division.

5. The City's demographic expert conceded that a small number of whites were actually added by the 1967 annexation. Although he included these whites as part of the 1965 annexation, Professor Williams maintained that his figures reflecting the total number of blacks and whites added to the City from 1965 to 1967 are correct.

Division were also considered, 1,901 whites thereby added would increase the percentage of white population to 50.3% and reduce the nonwhite population to 49.7%.[6]

By its August 10 resolution, Indianola presently seeks to make an additional annexation to add 1,391 nonwhites. Added to the population of the "inner-city" and the populations contained in the 1965 and 1967 annexations, the city population would then be 9,441, consisting of 4,047 whites (42.9%) and 5.394 nonwhites (57.1%). Thus, the City proposes to restore the racial composition of the City to substantially what it was on November 1, 1964. The City took this remedial action as soon as the 1980 census population maps became available.

(c) *Testimony of City Officials*

At the August hearing, Mayor Fratesi and the five aldermen, Charlotte Buchanan, Gary Austin, Harold Manning, Clarke Johnson and James Robinson, submitted affidavits and were cross-examined. The affidavits of attorneys Belk and Robertson were also received. In their affidavits, each of the city officials stated that he or she had no intention to violate our May order and that the City's actions were taken in good faith with the intention of making the franchise available to all who had previously voted in city elections and in an effort to present the Department with annexations that were of nondiscriminatory effect.

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6. In its objection letter, the Department of Justice stated that, according to 1980 census data, 1991 whites resided within the area annexed in 1965 and that, even considering the 1966 and 1967 annexations, the addition of this number of whites resulted in a 10.7% present dilution of black voting strength, while the figures provided by Prof. Williams indicate only a 6.3% dilution since 1964. Although these inconsistencies are unexplained, we deem them largely irrelevant.

On cross-examination, Mayor Fratesi stated that he did not know the reason for the delay from August 1980 until March 1981 in submitting the annexations to the Attorney General since the City had left the matter up to its attorneys. The City initially intended that persons residing in annexations approved by the Attorney General would be allowed to vote, but it was subsequently decided that the black persons residing in the 1966 and 1967 annexations would not be allowed to vote since the Attorney General objected to the 1965 annexation. Tr. 85-86.

Buchanan, who resides in the area annexed in 1965, stated that she understood from the Attorney General's June 1 letter that all persons, except those residing in the 1965 annexation would be allowed to vote, but that the city attorneys did not agree with her interpretation. Tr. 102. Austin also resides in the 1965 annexed area. He stated that it "has always been [his] understanding" that persons residing in area "that were approved by the Justice Department . . . would be allowed to vote, period." Tr. 114. Austin did not affirm Robertson's statement of the City's position in his June 5 and June 11 letters. Tr. 117-18.

Manning, also a resident of the 1965 annexation, testified that the city attorneys did not advise the board that persons residing in the areas annexed in 1966 and 1967 should not be allowed to vote. Tr. 124. Johnson took a somewhat different position, agreeing that persons residing in the areas annexed in 1966 and 1967 should not be allowed to vote because "it would be just as detrimental to the white voters as it would be for those black voters that would be disenfranchised. [Johnson] wanted to work up a package that would be satisfactory to everybody and give everybody a fair and honest vote." Tr. 137.

Robinson, the only black alderman, resides in one of the areas annexed in 1966 or 1967. Robinson understood "that once the Justice Department preclears any subdivision, that that particular city has no power to overrule the Justice Department." Tr. 144. Robinson, who first heard that the submission was on a package basis "after the Justice Department had made its ruling," characterized the package submission as follows:

> The package theory, to my mind, was just a defense by our legal group and had no bearing on what the Justice Department decided . . . . It was out of our hands. In my considered opinion, it was out of our hands the minute it got to the Justice Department.

Tr. 145.

None of the aldermen could recall a vote by them authorizing the annexations to be submitted as a package, although most acknowledged that the city attorneys were authorized to speak for the board.

Indianola's regularly scheduled guadrennial general elections for mayor and aldermen are to occur on December 8, 1981, and the primary election thirty days before, on November 10. Electors and candidates for office must qualify by October 9. Preparatory to holding the elections, election officials must purge the registration rolls and take other steps necessary to hold an orderly election. W. E. Felts, Assistant Clerk of the City of Indianola, stated in his affidavit that the City presently has over 6,000 names on its roll of registered voters and that, in order to properly purge the roll, the election commissioners could review no more than 500 names per day. On cross-examination, however, Felts acknowledged that the voter rolls are purged prior to every quadrenniel election, and that, in his ex-

perience, the process has never taken more than four or five days.

Because of the publicity attendant upon the positions taken by the parties and the hearings in court, Indianola citizens who reside in affected annexed areas are uncertain as to their status as voters and possible candidates in the fall elections.

LEGAL ANALYSIS

If this court had plenary jurisdiction to consider this matter, we would first ask "what was submitted to the Attorney General?" If it were determined that the submission was effectuated by the March 6 letter from Mayor Fratesi which was not conditioned in any way and that Robertson, as the City's special counsel, could not thereafter restrict the Attorney General's review, the inquiry need proceed no further, since under those circumstances the Attorney General would clearly have authority to preclear only those annexations he deemed to be nondiscriminatory. If, however, it were determined that the initial submission was validly amended[7] by Robertson's March 11 letter which conditioned preclearance on an "all or nothing" basis, we would then have to ask whether the Attorney General was justified in limiting his objection to the 1965 annexation.

It is, of course, well established that this local district court does not have unlimited jurisdiction in § 5 issues. *See* Allen v. Board of Elections, 393 US 544, 22 L ed 2d 1 (1969). Because we conclude that the Attorney General's actions in this case are insulated from judicial review, we may assume that the City's submission was

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7. The regulations recognize that a submission may be supplemented by the political unit. *See* 46 Fed. Reg. at 878 (1981) (to be codified in 28 CFR § 51.37).

validly amended to provide that all annexations were being submitted as a package.

Preclearance through the Attorney General was proposed and adopted as an expeditious alternative to declaratory judgment actions in the United States District Court for the District of Columbia. Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, at 237 (1965); *see* Harper v. Levi, 520 F. 2d 53, 65 (D.C. Cir. 1975). Recognizing that this objective would be frustrated if the Attorney General's action could be reviewed at the instance of an aggrieved party, the Supreme Court held in Morris v. Gressette, 432 US 491, 53 L ed 2d 506 (1977), that the Attorney General's failure to interpose an objection to voting changes within 60 days of the completed submission was not reviewable.

Morris involved a challenge to South Carolina's reapportionment statute. The state had submitted the statute to the Attorney General, who timely interposed an objection. Subsequently, the United States District Court for the District of South Carolina held that the statute violated the fifteenth amendment and allowed the state 30 days to enact a constitutionally acceptable reapportionment plan. The new plan was filed with the district court and the Attorney General. Since the district court upheld the new plan's constitutionality, the Attorney General notified the state that it felt constrained to defer to that court's determination and accordingly would not interpose an objecion. *Id.* at 493-97, 53 L ed 2d at 512-14.

Plaintiffs then commenced suit in the United States District Court for the District of Columbia, which ordered the Attorney General to make "a reasoned decision in accordance with his statutory responsibility." Harper v. Kleindienst, 362 F. Supp. 742, 746 (D.D.C. 1973). The

Attorney General responded by stating that while he felt the new plan has constitutional infirmities, he nonetheless felt constrained to abide by the South Carolina court's ruling. After being directed to ignore the South Carolina court's decision, the Attorney General interposed an objection. The objection came more than 60 days after the state submitted the new plan to the Attorney General. The D. C. Court of Appeals affirmed, holding that the Attorney General's action in failing to make an independent determination of § 5 issues was reviewable. *Harper v. Levi, supra.*

Plaintiffs then filed an independent suit in the South Carolina District Court seeking injunctive relief against implementation of the new reapportionment plan. The three-judge court in South Carolina refused to follow *Harper v. Levi,* and held that the Attorney General's actions were not reviewable. Morris v. Gressette, 425 F. Supp. 331, 337 (D.S.C. 1976).

On appeal the Supreme Court affirmed and held that the Attorney General's determinations under § 5 are not reviewable under the Administrative Procedures Act since "Congress did not intend the Attorney General's actions under that provision to be subject to judicial review." 432 US at 501, 53 L ed 2d at 517. The Court noted:

> In light of the potential severity of the § 5 remedy, the statutory language, and the legislative history, we think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of the validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to

> be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be "no dragging out" of the extraordinary federal remedy beyond the period specified in the statute. Since judicial review of the Attorney General's actions would unavoidably extend this period, it is necessarily precluded.

Id. at 504-05, 53 L ed 2d at 518-19 (footnotes and citations omitted). The Court's conclusion concerning nonreviewability was reinforced by the fact that neither the Attorney General's objection or failure to object is conclusive with respect to the validity *vel non* of the voting change. 432 US at 505, & n.21, 53 L ed 2d at 519 & n.21. Finally, the Court noted that courts must operate "on the assumption that the Attorney General of the United States will perform faithfully his statutory responsibilities." 432 US at 506, n.23, 53 L ed 2d at 520 n.23. In response to the United States' argument that judicial review should be allowed whenever "the Attorney General improperly relinquishes his responsibility to evaluate independently the submitted legislation in light of the standard established by § 5," the Court stated that "Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act." *Id.* at 507 n.24, 53 L ed at 520 n.24.[8]

Morris has been relied upon by the lower courts as precluding judicial review of the Attorney General's ac-

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8. The majority's result was over the dissent of Justice Marshall who stated:

> [I]t matters not whether the Attorney General fails to object because he misunderstands his legal duty . . .; because he loses the submission; or because he seeks to subvert the Voting Rights Act. Indeed, the Court today grants unreviewable discretion to a future Attorney General to bargain acquiescense in a discriminatory change in a State's voting laws in return for that State's electoral votes.

Id. at 508, 53 L ed 2d at 521.

tions in a variety of factual circumstances. In Harris v. Bell, 562 F. 2d 772 (D.C. Cir. 1977), plaintiffs contended that the Attorney General's action in withdrawing an objection to a submission violated his own regulations since the withdrawal was not based on "previously unavailable" information as the regulations then required. The district court held that it had authority to review the Attorney General's procedural determination and therefore denied defendant's motion to dismiss. Harris v. Levi, 416 F. Supp. 208, 210-11 (D.D.C. 1976). On appeal, the D. C. Circuit reversed upon the authority of *Morris* and held that there was "no basis for allowing judicial review of the Attorney General's determination that previously unavailable information justifies withdrawal of an objection, or of his application of the statutory standards in the context of a decision to withdraw." 562 F. 2d at 774.

In City of Rome v. United States, 450 F. Supp. 378 (D.D.C. 1978), *aff'd on other grounds*, 446 US 156, 64 L ed 119 (1980), the city filed suit alleging, *inter alia*, that the Attorney General's objection in the absence of a hearing or written findings violated its due process and other constitutional rights. The court dismissed the city's claim, holding that it was without jurisdiction to review the procedures used by the Attorney General in deciding to interpose an objection and that "[i]t is of no consequence in assessing . . . jurisdiction . . . whether the challenge is couched in terms of improper procedures or in terms of improper result." 450 F. Supp. at 381 & n.2. Responding to plaintiff's argument that judicial review of allegedly unconstitutional executive action is required under the doctrine of judicial supremacy, the *Rome* court recognized that "Congress has neither totally insulated the Attorney General's actions from judicial scrutiny nor totally deprived plaintiffs of judicial redress. Congress merely has established *an exclusive means* of obtain-

ing 'review' of the Attorney General's determination—a *de novo* proceeding in the District Court for the District of Columbia." *Id.* at 382 n.3 (emphasis in original).

In the case sub judice, Indianola argues that the Attorney General was without authority to preclear the 1966 and 1967 annexations while objecting to the 1965 annexation. The City's reasoning is that it submitted all annexations as a single change affecting voting. By not adhering to the City's "package consideration" condition, the City maintains that the Attorney General failed to preclear that which was submitted. The City concludes by stating that there is nothing "in the statute or regulations which permits the Justice Department to . . . preclear[] part of an annexation while rejecting other parts." Defendant's Opposition to Motion for Contempt Citation at 22. Under the authorities discussed above, however, there can be no judicial review of the Attorney General's action in preclearing three annexations while objecting to one. Indianola invoked the Attorney General's discretion by pursuing the administrative rather than judicial alternative to preclearance. Since "Congress intended to preclude all judicial review of the Attorney General's exercise of discretion" under § 5,[9] the City's sole remedy at this juncture is to institute suit in the D. C. court for a declaratory judgment that the 1965 annexation has neither a discriminatory purpose or effect. We are, in short, without jurisdiction to question the Attorney General's authority in limiting his objection to the 1965 annexation.[10]

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9. *Morris v. Gressette, supra,* at 507 n.24, 53 L ed 2d at 520 n.24.

10. We do note, however, that the Attorney General's action in objecting to only part of a submission is hardly novel. For example, in City of Rome v. United States, 446 US 156, 64 L ed 2d 119 (1980), the city submitted 60 annexations in one submission. The Attorney General approved 47 annexations

(Continued on following page)

Accordingly, the Attorney General's June 1 letter must be taken at face value. As such, it has the effect of precluding from voting or running for office only those electors residing in the May 1965 annexation. Electors residing in the areas annexed in 1966 and 1967 clearly should be allowed to vote. The City maintains that although the Attorney General may have precleared these areas, it is under no obligation to allow electors residing therein to vote, and that it may lawfully revert to the November 1, 1964, city boundaries for voting purposes. This argument must fail for two reasons. First, such action, if taken by the City, would amount to purposeful discrimination on the

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Footnote continued—

and objected to 13. On reconsideration, the Attorney General approved the 13 annexations for purposes of school board elections but not for purposes of city commission elections. *Id.* at 161-62, 64 L ed 2d at 130. The D. C. court, in a de novo declaratory judgment proceeding, reached the same result, which the Supreme Court affirmed. *Id.* at 187, 54 L ed 2d at 146.

Woods v. Hamilton, 473 F. Supp. 641 (D.S.C. 1979) suggests that the Attorney General had the duty to pass on all of the annexations submitted on March 6. There South Carolina submitted for preclearance an act which had three components. On the 60th day after the completed submission was received, the Attorney General responded as follows: (1) he expressly did not object to one component; (2) he attempted to reserve the right to object to another component; and (3) he did not mention the third component. *Id.* at 645. The district court held that all three aspects of the act were precleared since "[t]he statutory scheme makes [the Attorney General's] failure to object to such submission, or to any part thereof, within that [60 day] period tantamount to approval." *Id.* at 645. Since the state submitted the entire act, "the Attorney General was required to pass on all components of a complete submission." *Id.* at 646.

Although the City has apparently dropped its argument that the Attorney General's action in preclearing only three of the annexations operated as an automatic withdrawal of the submission see Defendant's Opposition to Motion for Contempt Citation at 20-24, such an argument would produce the same result as indicated above. The Attorney General's June 1 letter implicitly rejected the City's position that it could so withdraw a submission and his August 6 letter explicitly stated that the City did not have the right to withdraw its submission. We may not review this decision.

basis of race and therefore would violate the federal constitution. Indianola may not, in effect, de-annex black persons solely because it does not desire to provide the rights entitled to all citizens of a municipality. *See* Franklin v. City of Marks, 439 F. 2d 665, 670 (5 Cir. 1971). Furthermore, action of such character would itself amount to a voting change since citizens residing in the 1966 and 1967 annexed areas have voted for the past 15 years. Since there no longer exists a federal obstacle to their exercise of the franchise, § 5 would require federal preclearance before Indianola might lawfully take the position that citizens residing in 1966 and 1967 annexations may no longer be allowed to vote. In rejecting Indianola's assertion that it is free to restrict the electoral base as it may desire, we note the Fifth Circuit's holding in *City of Marks, supra,* that "[w]hat might be regarded as a routine municipal ordinance or proceeding in state law is therefore subjected to thorough analysis and examination in federal law when the effect of the ordinance or proceeding is to deprive citizens of their federally protected rights." The judgment of this court shall therefore fix the legal boundaries for voting purposes to consist of those boundaries existing on November 1, 1964, plus the areas annexed on May 4, 1966, September 2, 1966, and July 14, 1967.

We do not, however, believe that defendants or their counsel should be held in contempt of court. They have not, in fact, violated any order of this court since elections have not yet taken place.

Finally, we perceive no good reason for delaying the 1981 elections. It is clear that there remains more than adequate time for the City and prospective candidates to prepare for elections. Stripped of its assertion that there is not adequate time, the City's request to postpone elections is based solely on its desire to preclude its black

citizens from obtaining a "windfall" advantage in electing candidates of their choice. This justification clearly runs afoul of constitutional proscription against purposeful discrimination. Also it would be manifestly unjust to all persons legally entitled to vote for us to delay elections in order to give the City another opportunity to seek preclearance of the May 25, 1965, annexation, together with additional territory. Moreover, the present City officials, three of whom reside in the 1965 annexed area, should not be allowed to remain in office beyond the expiration of their present term for an indefinite period awaiting the outcome of what promises to be lengthy contests in state court and before the Department of Justice.

We therefore conclude that city elections should proceed as scheduled and that only those electors presently residing in the city limits as established on November 1, 1964, and in the areas annexed on May 4, 1966, September 2, 1966, and July 14, 1967, be allowed to vote in the fall 1981 primary and general elections unless the City, before October 9, 1981, shall have additional annexations approved by the Mississippi state courts and precleared pursuant to § 5 of the Voting Rights Act.

Judgment will be issued in accordance with Fed. R. Civ. P. 58.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

NO. GC 80-220-WK-O

NELSON DOTSON, ET AL, Plaintiffs

vs.

CITY OF INDIANOLA, MISSISSIPPI, ET AL,
Defendants

JUDGMENT

In accordance with Memorandum of Decision this date released, it is

ORDERED

1. That defendants be and the same are hereby enjoined to hold municipal elections in the City of Indianola as scheduled by law, i.e., primary election on November 10, 1981, and general election on December 8, 1981.

2. That only those qualified electors residing in the city boundaries as they existed on November 1, 1964, and in areas annexed on May 4, 1966, September 2, 1966, or July 14, 1967, shall be allowed to vote in said 1981 elections.

3. That persons residing in the area annexed on May 25, 1965, or other areas not mentioned in (2) above may not vote in the 1981 elections unless the City of Indianola, by October 9, 1981, shall have such additional areas approved by Mississippi state courts and precleared in ac-

cordance with § 5 of the Voting Rights Act, 42 USC § 1973c.

4. That defendants shall cause its voter registration rolls to be purged of all names other than those which show residence in one of the areas described in (2) above and to take all steps necessary to have orderly elections as provided by law.

5. That defendants shall forthwith cause to be published a notice in the immediately forthcoming issue of the Enterprise-Tocsin, a newspaper published and having general circulation in the City of Indianola, advising the public that

(a) the primary election for municipal offices will be held on November 10, 1981, and the general election on December 8, 1981, as scheduled by law;

(b) only those qualified electors residing in the city boundaries as they existed on November 1, 1964, and in areas annexed on May 4, 1966, September 2, 1966, or July 14, 1967, shall be allowed to vote in said elections;

(c) persons residing in the area annexed on May 25, 1965, and other areas not mentioned above may not vote in the 1981 elections unless the City, by October 9, 1981, shall have additional areas approved by Mississippi state courts and precleared in accordance with § 5 of the Voting Rights Act, 42 USC § 1973c.

Said notice shall be run every week until October 9, 1981. Proof of publication shall be promptly filed with the clerk of court.

The clerk of this court is directed to serve a certified copy of this order, by certified mail, to counsel for all parties and the following named defendants: Philip Fra-

tesi, Mayor, and Gary L. Austin, Charlotte H. Buchanan, G. Clark Johnson, W. Harold Manning, and James D. Robinson, members of the Board of Aldermen of the City of Indianola, Mississippi.

This, 2nd day of September, 1981.

/s/ Charles Clark
United States Circuit Judge

/s/ William C. Keady
United States District Judge

/s/ T. L. Senter, Jr.
United States District Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
GREENVILLE DIVISION

NO. GC80-220-WK-O

NELSON DOTSON, et al.,
Plaintiffs

v.

THE CITY OF INDIANOLA, et al.,
Defendants

MEMORANDUM OF DECISION

In this case, black citizens of Sunflower County, some of which are also residents of Indianola, Mississippi, bring a class action on behalf of similarly situated persons, to assail, inter alia, the failure of the City of Indianola to comply with Section 5 of the Voting Rights Act of 1965, 42 USC § 1973c, by annexing subdivisions of real property without securing approval of the Attorney General of the United States or obtaining a favorable declaratory judgment from the United States District Court for the District of Columbia. Because of this noncompliance, plaintiffs request the convening of a three-judge court under 42 USC § 1973c to determine issues raised by the complaint. For reasons that follow, the undersigned, as initiating judge, requests the convening of the statutory three-judge court. A summary of the complaint, filed on October 1, 1980, is in order.

Court I alleges that annexations approved by the Chancery Court of Sunflower County on May 25, 1965, March 17, 1966, and June 1, 1967, were of areas that were then and are now occupied solely by members of the white race and were not submitted to the Attorney General of the United States nor to the United States District Court for the District of Columbia for a declaratory judgment that the annexations "will not have the effect of denying or abridging the right to vote on account of race or color. 42 USC § 1973c.[1] These annexations are alleged to (a) deny or abridge, on account of race, the votes of black citizens of Indianola; (b) dilute the voting strength of black voters; (c) enlarge a discriminatory at-large electoral system, thereby insuring white electoral dominance in municipal elections; (d) perpetuate and enhance the power of a white voting-age minority; and (e) continue and maintain a pattern and practice of denial of fair participation of blacks in the city electoral system.

Count II alleges a failure and refusal of defendants to incorporate within the city subdivisions occupied by blacks in close or immediate proximity to the city. This failure to annex allegedly constitutes a change in qualification, prerequisite, standard, practice or procedure with regard to voting, thereby requiring compliance with Section 5 of the Voting Rights Act.

Count III of the complaint alleges that the failure or refusal of the city to annex black subdivisions results from defendants' use of race as a factor in determining what areas shall or shall not be annexed.

Count IV alleges that the failure to annex areas with high concentrations of blacks has denied equal protection of blacks in regard to police and fire protection and related

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1. Annexation constitutes a change in "standard, practice, or procedure with respect to voting" under 42 USC § 1973c. Perkins v. Matthews, 400 U.S. 379, 27 L. Ed. 2d 476 (1971).

municipal services, as well as the benefits of state and federal programs including revenue sharing and housing programs.

Count V alleges that the above failures of defendants have the purpose and effect of denying to plaintiffs and the classes which they seek to represent "the same rights and privileges to exercise the elective franchise as is provided to white persons similarly situated in violation of the 13th, 14th and 15th Amendments to the Constitution of the United States.

Plaintiffs request the court to:

1. Convene a three-judge court pursuant to 28 USC § 2284 and 42 USC § 1973c;
2. Declare the annexations of 1965, 1966, and 1967 as violative of the Voting Rights Act of 1965, as well as the thirteenth, fourteenth and fifteenth amendments to the Constitution of the United States;
3. Declare that the failure of the city to annex non-residential black subdivisions to be violative of the Voting Rights Act and the thirteenth, fourteenth and fifteenth amendments to the constitution;
4. Issue a preliminary and permanent injunction designating appropriate boundary lines for the city;
5. Enjoin the city to incorporate and annex all black-occupied properties and subdivisions adjacent to or contiguous with the city boundaries, including certain named subdivisions; and
6. After determining said boundaries, order immediate elections under a viable elective system which allows the potential for fair representation by blacks in the municipal electoral process.

On October 2, 1980, this court requested that the parties brief the issue regarding the substantiality of the request for a three-judge court. Specifically, the court was concerned with whether Count I, which charged violations of Section 5 of the Act by the failure of the city to submit for federal scrutiny and approval the city's annexation of white-only areas in the 1960's, was, after thirteen years, time barred and whether the other counts, alleging failure and refusal to annex black areas, state claims under which relief may be granted under Section 5 of the Act.

Upon the filing of briefs and other materials, the court ascertained, from affidavit filed by plaintiffs' counsel after reviewing public records, the following facts:

1. On October 2, 1975, J. Stanley Pottinger, Assistant Attorney General of the United States, wrote to Frank Crosthwait, Jr., Indianola City Attorney, requesting submissions of annexation changes in the city since November 1, 1965.

2. On or about November 10, 1975, Crosthwait responded to Pottinger's letter, noting that the city had initiated three separate annexations, which annexations were approved by the Chancery Court of Sunflower County on May 4, 1966, September 2, 1966, and July 24, 1967.

3. On December 23, 1975, Pottinger responded to the November letter, and requested the provision of the following supplemental information:

    A. The population and racial composition of Indianola before all annexations, and the number of black and white registered voters, if known.

B. The population and racial composition of each area annexed, and the number of black and white registered voters, if known, at the time of annexation and presently.

C. The purpose of each annexation.

D. The development of the area annexed at the time of annexation, presently, and that expected in the near future.

E. Information as to whether there have been formal or informal requests for annexations since 1969.

F. A description of areas of black concentration outside the city.

G. A map of the city showing the annexed area, and noting the black neighborhoods.

H. A description of the form of city government, and the method of electing city officials.

The letter further stated that "[t]he Attorney General has 60 days in which to consider a submission pursuant to Section 5. This 60-day period will commence when the Department receives the information necessary to evaluate properly the changes proposed in your present submission."

4. On August 21, 1980, Drew S. Days, III, Assistant Attorney General, wrote the following letter to Dean Belk, present City Attorney:

> This is in reference to our letter dated December 23, 1975, which requested additional information concerning the 1966 and 1967 annexations to the City of Indianola in Sunflower

County, Mississippi, submitted to the Attorney General on November 12, 1975, pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

Our records indicate that we have not received your response. Please be advised that unless or until the City of Indianola receives a declaratory judgment from the United States District Court for the District of Columbia or the Attorney General interposes no objection to the changes in question, these changes are not legally enforceable insofar as they affect voting. Also, we remind you that, if no response is received within sixty days of our initial request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. See 28 C.F.R. § 1.19.

Enclosed is a copy of our letter requesting the additional information needed in order for the Attorney General to make a determination that the changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority. As you know the Attorney General has sixty days in which to consider a submission pursuant to Section 5. The sixty-day period will begin when this Department receives the information necessary for the proper evaluation of the changes you have submitted.

Also, it has come to our attention that in 1965 an unincorporated area was annexed to the City of Indianola (annexation filed April

16, 1965; Cause No. 13304; approved and signed by the Chancery Clerk on May 25, 1965).

Our records fail to show that this change affecting voting has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act of 1965, as amended. If our information is correct, it is necessary that this change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a Section 5 review.

Should you elect to submit this change to the Attorney General, please follow the proceedings set forth in the enclosed Procedural Guidelines for the Administration of Section 5 (28 C.F.R. Part 51). It would be helpful if you would include the information requested for the other annexations in our December 23, 1975, letter. In addition, it would be helpful if you would submit election returns, by voting precinct, for any elections held by the city since 1965 in which a black candidate has participated. Please indicate the race of each candidate, the winner(s) of each contest, and the number of persons who voted in each election.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us within twenty days of your receipt of this letter what course of action the City of Indianola plans to take with respect to this matter . . . .

> As of October 30, 1980, the city failed to provide the information requested by the Attorney General's office in the letters of December 23, 1975, and August 21, 1980. This apparent ignoring of requests for information by the Attorney General pursuant to a statutory duty, in our view, effectively tolls any limitations period since the date of the original annexations.

Since Mississippi's six-year catch-all statute of limitations found in § 15-1-49, Miss. Code Ann. (1972) appears to be the most analogous state statute of limitations,[2] and since the city has failed to submit the annexations to the Attorney General or the District of Columbia court despite specific requests from the Attorney General's office in 1975 and again in 1980, a most substantial claim can be made the instant suit was timely filed. We therefore need not address the wholly novel question of whether any limitations period whatever applies in actions brought under the Voting Rights Act of 1965.

The second question posed to the parties' counsel in our October 2, 1980, letter concerned the necessity of convening a three-judge court as to all the issues raised in plantiffs' complaint. Our research has revealed, however, that once a substantial three-judge court issue has been raised, three-judge court jurisdiction exists over all of plaintiffs' claims, even those which would not ordinarily be within the purview of a three-judge court. See Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 504 n. 5,

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2. We decline to apply the ten-day period found in § 21-1-21 as urged by defendants. *See* Franklin v. Marks, 439 F. 2d 665 (5 Cir. 1971). Defendants agree, however, that aside from § 21-1-21, the six-year period of limitations would apply. It should be noted, however, that Franklin v. Marks was a Section 1983 complaint and not a claim for violation of Section 5 of the Voting Rights Act.

32 L. Ed. 2d 257, 265 n. 5 (1972). The Fifth Circuit has stated that "[e]ven when there are separate claims, the three-judge court has jurisdiction to decide ancillary and dependent claims, resting upon a single and interrelated complex of facts." Haining v. Roberts, 453 F. 2d 1223, 1224 n. 1 (5 Cir. 1971), *cert. denied*, 406 U.S. 948, 32 L. Ed. 2d 336 (1972). One of the reasons behind three-judge court pendent jurisdiction is judicial efficiency. *Id.* If, however, the three-judge court determines that it would be more efficient for a single judge to hear non-three-judge court claims, it may remand those claims to a single judge after its ruling. *See* Rosado v. Wyman, 397 U.S. 397, 403, 25 L. Ed. 2d 442, 450 (1970); Sullivan v. Crowell, 444 F. Supp. 606, 613 (W.D. Tenn. 1978). In any event, it is now clear to us that a three-judge court should be convened. Accordingly, it is

ORDERED:

That request be made of Honorable James P. Coleman, Chief Judge of the United States Court of Appeals for the Fifth Circuit, for the convening of a three-judge court, pursuant to 28 U.S.C. § 2284, to determine issues raised with respect to the noncompliance of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and such other issues as the three-judge court may determine to resolve.

This, the 26th day of January, 1981.

/s/ William C. Keady
Chief Judge
United States District Court

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

NO. GC80-220-WK-O

NELSON DOTSON, ET AL.,
Plaintiffs,

- vs -

THE CITY OF INDIANOLA,
ET AL.,
Defendants.

(1) Requesting Judge:
Honorable William C. Keady
Northern District of Mississippi

(2) District Judge:
Honorable Thomas L. Senter, Jr.
Northern District of Mississippi

(3) Circuit Judge:
Honorable Charles Clark

Date of Order: January 31, 1981

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, James P. Coleman, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate.

/s/ Jas. P. Coleman
James P. Coleman
Chief Judge
Fifth Circuit

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

NO. GC80-220-WK-0

NELSON DOTSON, et al.,
Plaintiffs

versus

THE CITY OF INDIANOLA, et al.,
Defendants

(May 13, 1981)

OPINION

Before CHARLES CLARK, Circuit Judge; KEADY, Chief Judge; and SENTER, District Judge.

CHARLES CLARK, Circuit Judge:

On October 1, 1980, Nelson Dotson and fifteen other black adult citizens, residents, and qualified electors of Sunflower County, Mississippi, brought this action pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1971 *et seq.* Section 5 prohibits a state or political subdivision from enacting or seeking to administer any voting qualification, prerequisite, standard, practice, or procedure different from that in effect on November 1, 1964, without first either obtaining a declaratory judgment in the United States District Court for the District of Columbia or securing tacit recognition from the Attorney General that the voting change does not have the purpose or effect of denying or abridging the right to vote on ac-

count of race, color, or membership in a language minority. 42 U.S.C. § 1973c.

The complaint in this case is composed of five counts, only the first of which is presently under consideration. In Count I the plaintiffs challenge four annexations to the corporate limits of Indianola, claiming that the City violated Section 5 when it made these annexations without obtaining preclearance as required by the Act. They seek declaratory and injunctive relief against Phillip Fratesi, Mayor of Indianola, and against Gary L. Austin, Charlotte H. Buchanan, G. Clarke Johnson, W. Harold Manning, and James D. Robinson, members of the Indianola Board of Aldermen. The plaintiffs seek an order setting aside the 1977 municipal elections and scheduling a special election to choose new city officials. They also ask for prospective injunctive relief requiring the City to hold future elections based upon the pre-annexation city limits.

We grant only the plaintiffs' request for declaratory and prospective injunctive relief.

I.

Substantially all of the facts necessary to the disposition of the issues in this case have been stipulated by the parties. On May 25, 1965; May 4, 1966; September 2, 1966; and July 14, 1967, the City of Indianola obtained decrees from the Chancery Court of Sunflower County, Mississippi, approving its Petitions for Confirmation of Extension of Boundaries. Each of these annexations added new eligible voters to the electoral base for Indianola; and the City now concedes, as it must, that annexations enlarging the number of eligible voters in the municipality are changes of a voting qualification, prerequisite, standard, practice, or procedure as contemplated by Section 5 of the Voting Rights Act. *See* Perkins v. Matthews, 400 U.S. 379, 388-

95, 91 S.Ct. 431, 437-39, 27 L.Ed.2d 476, 484-89 (1971). Indianola also concedes that it has not yet obtained preclearance of these annexations as required by Section 5.

Indianola has implemented the 1965-67 annexations in the municipal elections conducted in 1968, 1969, 1973, and 1977. In each of these elections, persons residing in the newly annexed areas have participated both as voters and as candidates. The incumbent mayor and aldermen were all elected in 1977, and four of the five present aldermen reside in the annexed areas.

Some additional facts are relevant to the question of the scope of relief to be afforded in this case. On October 2, 1975, J. Stanley Pottinger, Assistant U.S. Attorney General for the Civil Rights Division, wrote to Frank Crosthwait, then City Attorney for Indianola. Pottinger informed Crosthwait that the Division had learned of several annexations to the corporate limits of Indianola and advised him that these changes in voting practice or procedure could not lawfully be implemented unless the City first complied with the preclearance requirement of Section 5. Pottinger requested the City to submit the annexations to the Attorney General for review or to bring an appropriate declaratory action in the District Court for the District of Columbia. On November 10, 1975, Crosthwait replied to the Pottinger letter, noting three of the challenged annexations and identifying them by their location in the Chancery Clerk's records. Crosthwait's letter did not refer to the 1965 annexation.

On December 23, 1975, Pottinger again wrote to Crosthwait, this time requesting additional information necessary for proper evaluation of the annexations. For some unexplained reason, the City never responded to this request. Then, on August 21, 1980, the Department of Justice

wrote to the present City Attorney, W. Dean Belk, and asked the City to provide the additional information previously requested concerning the 1966 and 1967 annexations. The Justice Department also requested the same kind of information for the 1965 annexation. The City represents to this court that it has now submitted all of the information sought by the Department of Justice concerning each of these annexations.

II.

The Voting Rights Act ordinarily limits the issues for determination by the three-judge court to the question of whether the political subdivision has complied with the requirements of the Act and to the nature of relief to be afforded the plaintiffs in the event of non-compliance. *See* United States v. Board of Supervisors of Warren County, Miss., 429 U.S. 642, 97 S.Ct. 833, 51 L.Ed.2d 106 (1977); Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971).

However, Indianola has interposed numerous defenses to the plaintiffs' requested relief. The main defense, and the one upon which the City primarily relies, is the doctrine of laches. Laches is an equitable concept that may operate in some contexts as a time limitation barring a plaintiff's claim. It is founded upon the policies of promoting repose in society, encouraging diligence in plaintiffs, avoiding evidentiary problems occasioned by long delay, and advancing shared concepts of justice. *See generally* Note, *The Application of the Doctrine of Laches in Public Interest Litigation,* 56 B.U.L. Rev. 181, 196 (1976). To prevail on a laches defense, a defendant must show a delay by the plaintiff in asserting a right or claim, that the delay was inexcusable, and there has been undue prejudice to the defendant resulting from the delay. *See,*

e.g., Environmental Defense Fund v. Alexander, 614 F.2d 474, 478 (5th Cir. 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 316, 66 L.Ed.2d 146 (1980); Bernard v. Gulf Oil Co., 596 F.2d 1249, 1256 (5th Cir. 1979); Matter of Henderson, 577 F.2d 997, 1001 (5th Cir. 1978).

Although there is no precedent for application of the laches defense to private suits for injunctive relief under Section 5, the City urges us to adopt it in this case. The gist of its argument is as follows. Indianola first annexed adjacent lands in 1965. Thus, the plaintiffs have delayed 15 years before initiating this action. The City then argues that we should look to the analogous state statute of limitations, in this case the six-year "catch-all" statute embodied in Miss. Code Ann. § 15-1-49 (1972). Since the plaintiffs' delay exceeds the applicable limitations period, a presumption arises that the delay is inexcusable, thereby shifting to the plaintiffs the burden of showing some justification for the untimeliness of their suit. To demonstrate prejudice the City offers three categories of evidence. First, it offers proof of potential witnesses who are now deceased or who have diminished memories of the events surrounding the annexations to show it has incurred a disadvantage in asserting or establishing its claims or defenses. Second, the City offers to show that it has expanded municipal services and incurred bond obligations on the assumption that the annexations were properly made. Third, the City proffers evidence of injury to citizens and residents of Indianola who, relying in good faith on the validity of the annexations, have moved into and purchased property in the newly annexed areas.

Nevertheless, we conclude that the doctrine of laches is not available in a private action for injunctive relief brought under Section 5 of the Voting Rights Act. We do so for several reasons.

First, application of the laches defense to bar the plaintiffs' action would frustrate the remedial purposes of the Act. Section 5 was intended to prevent covered states from fashioning voting changes which might deprive blacks of their right to vote. *See generally* South Carolina v. Katzenbach, 383 U.S. 301, 308-16, 86 S.Ct. 803, 808-12, 15 L.Ed.2d 769, 775-80 (1966). Congress imposed upon the covered states the burden of submitting any change in voting practice or procedures for approval in Washington, D.C., before it became effective. *See* Perkins v. Matthews, 400 U.S. 379, 396, 91 S.Ct. 431, 441, 27 L.Ed.2d 476, 489 (1971); Ramos v. Koebig, 638 F.2d 838, 846 (5th Cir. 1981).

Indianola has not discharged its undisputed obligation to submit these four annexations to either test designated by Congress. The burden to obtain federal approval of those annexations before conducting elections based upon the new corporate limits has always rested with the City. The laches defense, however, presupposes that the plaintiffs had an obligation to challenge the altered voting regulation in the first instance. Allowing Indianola to assert laches to bar the plaintiffs' requested relief would transform its own long failure to comply with the duty imposed upon it by Section 5 into a defense. Under this approach, the longer the City delayed in fulfilling its statutory responsibilities, the better its defense would become. Therefore, to apply the doctrine of laches to a private injunctive action" would be to do precisely what § 5 was designed to forbid: allow the burden of litigation delay to operate in favor of the perpetrators and against the victims of possibly racially discriminatory practices." Berry v. Doles, 438 U.S. 190, 194, 98 S.Ct. 2692, 2694, 57 L.Ed.2d 693, 697 (1978) (Brennan, J., concurring) (citation omitted).

Second, the doctrine of laches is inconsistent with the nature of the obligation imposed by Section 5 upon affected

states and political subdivisions. The duty to obtain federal approval of new voting standards, practices, or procedures is a continuing one. It arises anew each time the defendant enacts or seeks to administer an uncleared voting regulation. *See* 42 U.S.C. § 1973c. Even though Indianola effected the challenged annexations during 1965, 1966, and 1967, it breached its statutory duty to secure preclearance of the annexations when it conducted municipal elections in 1968, 1969, 1973, and 1977 based upon the post-annexation corporate limits. Although the City insists that the plaintiffs have delayed bringing this action for at least 13 years, it is clear that Indianola violated Section 5 as recently as 1977 by holding municipal elections utilizing boundary changes which had not been precleared. Thus, the vice of City's past non-compliance survives unabated as a present violation.

Third, the remedy sought does not go to the legality of the annexations. It is limited to the right of those living in such areas to vote in municipal elections.

For similar reasons we reject the City's proffered statute of limitations defense. Assuming without deciding that an action for injunctive relief brought by a private litigant could be barred by the running of an analogous state statute of limitations, it is clear that the applicable six-year limitations period of Miss. Code Ann. § 15-1-49 (1972) has not yet run. Less than four years ago, Indianola held municipal elections which improperly implemented the four challenged annexations. Therefore, even if applicable, the statutory period has not expired as to this election.

In addition to the laches and statute of limitations claims, the City raises several other defenses in its answer, including the necessity under state law that one objecting to an annexation take an appeal within 10 days

from the approving judgment of the Chancery Court, exhaustion of state remedies, and the unconstitutionality of the Voting Rights Act. The City has not pressed these contentions before the three-judge court. They are without merit, and we reject them.

III.

We come now to the question of remedy. Since Indianola admits that the challenged annexations are subject to the Act's preclearance requirement and that it has failed to fully comply with the provisions of Section 5, the municipal elections conducted by Indianola in 1977 were in violation of the Voting Rights Act. To remedy the municipality's past implementation of the unapproved annexations, plaintiffs seek an order setting aside the 1977 elections, ousting the incumbent city officials, and compelling a special election to choose replacements to serve until the next regularly scheduled election. Although the Supreme Court has tacitly recognized that such retrospective relief may be appropriate in some cases where an election implementing a covered voting change has been held without preclearance, it has never decided a case specifically endorsing such a remedy. We conclude that ordering a special election is unwarranted in the circumstances of this case.

The Supreme Court has identified several factors to be considered when determining whether overturning an election and ordering a new one will be justified. One factor is whether the state or political subdivision could reasonably be expected to have known that the election violated Section 5. When the issue of whether the disputed change in voting practices or procedures is novel or unsettled, then ordering a new election would not be appropriate. *See* Allen v. State Board of Elections, 393 U.S. 544, 571-72, 89 S.Ct. 817, 835, 22 L.Ed.2d 1, 20-21 (1969).

In Perkins v. Matthews, 400 U.S. at 396-97, 91 S.Ct. at 441, 27 L.Ed.2d at 489-90, the Court identified several other factors relevant to fashioning appropriate relief. Included were the nature of the voting changes involved and whether the political subdivision had sought federal approval. Where no submission of the implemented change had been made pursuant to Section 5, *Perkins* suggested that it might be appropriate to give the affected jurisdiction a period of time in which to seek preclearance, ordering a new election only if preclearance were not obtained. *Id.*

Finally, in Berry v. Doles, 438 U.S. at 192-93, 98 S.Ct. at 2693-94, 57 L.Ed.2d at 696, the Supreme Court adopted the remedial approach suggested in *Perkins*. In *Berry*, the covered change was a statute staggering the terms of the members of a county board, administered in an election held without preclearance. The district court enjoined future enforcement of the statute but refused to set aside the past election because the statute effected a minor, technical change and because there was no evidence of discriminatory intent. The Court remanded the case with directions to enter an order allowing the defendants 30 days to submit the change pursuant to Section 5. The Court noted that if preclearance were denied or not sought, the district court might properly order all members of the board to be elected simultaneously at the general election. *Id.* at 192-93, 91 S.Ct. at 2694, 57 L.Ed.2d at 696.

Relying upon these factors, the plaintiffs urge that ordering new elections is justified in this case. They point out that these four annexations made extensive and comprehensive changes in voting practices and not minor or technical ones. They also point out that the City must have known of its duty to seek federal approval of these changes since *Perkins v. Matthews* established in 1971 that such annexations were covered by the Act. *See* 400 U.S. at 389-90, 91 S.Ct. at 437, 27 L.Ed.2d at 485-

86. Moreover, they emphasize that the 1975 Pottinger-Crosthwait correspondence indicates that the City actually knew of its statutory duty.

After giving full consideration to these facts, we nevertheless decline to order new elections. Two reasons predominate. First, counsel for the City of Indianola have represented to the court that all the requested preclearance information has been submitted to the Attorney General of the United States as of May 1, 1981. This submission makes possible a final resolution of the dispute.

Second, burdens imposed upon the City and its residents by holding special elections decidedly outweigh the benefits inuring to the plaintiffs and public. The incumbent mayor and aldermen, elected in 1977, have already served more than three-quarters of their terms. Scheduled regular primary and general elections must be conducted November 8 and December 10 of this year. City officials chosen for the remainder of the incumbents' terms at a special election which allowed meaningful time for campaigning would serve only a few months before the regular election process commenced.

Any elections are expensive and time-consuming. Special elections would entail compaign expenses for both black and white candidates and supporters to gain relatively brief terms of office. The burdens of cost and disruption of the orderly administration of municipal affairs entailed by special elections would far outweigh the possible benefits to the general public. The plaintiffs themselves would obtain little or no benefit, too. To avoid the 1977 elections and order a special election could do nothing but vindicate an abstract right without according any perceptible advantage in addition to the remaining relief we grant. Taking into account the rights of all the parties involved and the public, we decline to require special elections now.

The incumbent city officials may continue to hold office for the remainder of their present terms and until their successors are elected and take office at the regular elections held later this year.

However, Indianola cannot continue to hold elections based upon uncleared post-annexation city limits. Unless and until the City obtains clearance of its post-Act annexations in accordance with Section 5, all future elections must be conducted on the basis of the city boundaries as they existed before the unprecleared annexations were made, and citizens residing in such annexed areas may not participate in future municipal elections, either as electors or as candidates. *Cf.* Perkins v. Matthews, 400 U.S. at 397 n.14, 91 S.Ct. at 441 n.14, 27 L.Ed.2d at 490 n.14. This relief applies only to the right to vote and be a candidate. It does not, of course, constitute de-annexation, and it does not affect the rights of citizens residing in the annexed areas in any other way.

Therefore, having determined that the May 25, 1965; May 4, 1966; September 2, 1966; and July 14, 1967, annexations by the City of Indianola constitute voting qualifications, prerequisites, standards, practices, or procedures different from those in force or effect November 1, 1964; that such differences are within the coverage of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c; and that the City failed to comply with the provisions of Section 5 with regard to such changes, the court concludes that the plaintiffs are entitled to the declaratory and injunctive relief set out above. All the remaining issues should be remanded to Judge William C. Keady for determination as a single district judge.

Judgment will be entered in accordance with Fed. R. Civ. P. 58.

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

NO. GC80-220-WK-0

NELSON DOTSON, et al.,
Plaintiffs

versus

THE CITY OF INDIANOLA, et al.,
Defendants

JUDGMENT

For the reasons set out in the Opinion of this court entered this date,

It is DECLARED AND ADJUDGED that the annexations to its corporate limits effected by the City of Indianola, Mississippi, on May 25, 1965; May 4, 1966; September 2, 1966; and July 14, 1967, constitute voting qualifications or prerequisites to voting or standards, practices, or procedures different from those in force and effect on November 1, 1964, within the meaning of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, that Indianola has failed to fully comply with the provisions of that Act before enacting or administering those changes, and that the conduct of elections by the City of Indianola which encompass such annexed areas as a part of the municipality is violative of the Act.

It is ORDERED, ADJUDGED AND DECREED that the legal boundary lines of the City of Indianola, Mississippi, shall be, for the purpose of conducting municipal elections,

those in force and effect prior to November 1, 1964; *provided,* that the City of Indianola may enforce in such elections any subsequent annexations which are properly precleared in accordance with the provisions of said Section 5 of the Voting Rights Act. Citizens residing in areas annexed prior to such preclearance shall have all other rights of citizens in the municipality except the right to participate in municipal elections as candidates or electors.

It is FURTHER ORDERED that this case be and is hereby remanded to Honorable William C. Keady as a single-judge for the purpose of hearing and disposing of all other claims raised by the plaintiffs and not considered by this court.

Nothing contained in the Opinion of this court nor in this Order nor the continuing jurisdiction of this court to enforce its terms nor the jurisdiction of the single judge to hear the remaining issues in this cause shall be construed as cause to delay the promptest possible determination by the Attorney General of the United States of whether to object to all or any part of the four annexations submitted by the City of Indianola for his approval.

SO ORDERED this 13 day of May, 1981.

/s/ Charles Clark
United States Circuit Judge

/s/ William C. Keady
United States Circuit Judge

/s/ L. T. Senter, Jr.
United States Circuit Judge

APPENDIX G

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

Amendment XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

APPENDIX I

Section 5 of the Voting Rights Act of 1965 42 U.S.C. § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court, appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose

and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

As amended Pub.L. 94-73; Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 404.

APPENDIX J

(Filed September 11, 1981)

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CIVIL ACTION NO. GC 80-220-WK-O

NELSON DOTSON, ET AL,
PLAINTIFFS

vs.

CITY OF INDIANOLA, MISSISSIPPI, ET AL,
DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that Philip Fratesi, Mayor, and Gary L. Austin, Charlotte H. Buchanan, Clarke Johnson, W. Harold Manning, and James D. Robinson, members of the Board of Aldermen of Indianola, Mississippi, acting in their official capacities and also individually, and the City of Indianola, Mississippi, an incorporated municipality, in the State of Mississippi, being all of the Defendants herein, appeal to the Supreme Court of the United States from that certain Judgment entered on September 2, 1981.

The Order or Judgment referred to above from which this appeal is taken was entered by a Three Judge Court, the members of which were Honorable Charles Clark, United States Circuit Judge; Honorable William C. Keady, Chief Judge, United States District Court for the Northern District of Mississippi; and Honorable L.T. Senter, Jr., United States District Judge. Defendants-Appellants are

of the opinion that the appeal from this Order or Judgment lies directly to the Supreme Court of the United States pursuant to 42 U.S.C. §1973c. Notice of Appeal to the United States Court of Appeals for the Fifth Circuit is being given in order to protect the rights of Defendants-Appellants in the event it should hereinafter be determined by the Supreme Court of the United States that it has no jurisdiction over this appeal.

This 9 day of September, 1981.

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CERTIFICATE OF SERVICE

I, JAMES L. ROBERTSON, one of the Attorneys of Record for Defendants, THE CITY OF INDIANOLA, MISSISSIPPI, ET AL, do hereby certify that I have mailed, postage prepaid, a true and correct copy of the above and foregoing Notice of Appeal to the following, to-wit:

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This the 9 day of September, 1981.

/s/ James L. Robertson
James L. Robertson

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
JAN 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-837

In The

Supreme Court of the United States

October Term, 1981

CITY OF INDIANOLA, MISSISSIPPI, *et al.*,
Appellants,

—v.—

NELSON DOTSON, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

MOTION OF APPELLEES NELSON DOTSON, ET AL., TO DISMISS OR AFFIRM

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Questions Presented

1. Whether this Court is precluded from judicial review of the actions of the Attorney General of the United States under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, pursuant to the ruling in *Morris* v. *Gressette*, 432 U.S. 491 (1977).

2. Whether a municipal jurisdiction covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, may give effect to a voting "change" by allowing residents of subdivisions annexed after November 1, 1964, to vote in City elections in the absence of required preclearance.

3. Whether a jurisdiction covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, may deny the right to vote to residents of precleared annexed areas occupied solely by black people because the Attorney General refuses to preclear an annexed area occupied solely by white people.

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In The

Supreme Court of the United States

October Term, 1981

No. 81-837

CITY OF INDIANOLA, MISSISSIPPI, *et. al.*,
Appellants,

—v.—

NELSON DOTSON, *et al.*,
Appellees.

MOTION OF APPELLEES NELSON DOTSON, ET AL., TO DISMISS OR AFFIRM

The Appellees, Nelson Dotson, et al., respectfully move to dismiss this appeal or to affirm the September 2, 1981, judgment of the United States District Court for the Northern District of Mississippi. Rule 16(1)(c) and (d). This motion is filed on the following grounds:

(1) It is manifest that the questions on which the decision of the cause depends are so insubstantial as to need no further argument;

(2) The decision below is so obviously correct as to warrant no further review.

Counter-Statement of the Case

A.

Nature of the Case

This is a direct appeal from a judgment entered on September 2, 1981, by a District Court of three Judges specially convened pursuant to 28 U.S.C. § 2284 to determine issues raised with respect to the Appellant City of Indianola's non-compliance with Section 5 of the Voting Rights Act of 1965, as amended. The City of Indianola is a "covered" jurisdiction under the provisions of Section 5 of the Voting Rights Act of 1965. Section 5 requires that any "change" affecting voting, occurring after November 1, 1964, be precleared by the United States Department of Justice or the United States District Court for the District of Columbia before said "change" may take effect.

Indianola, Mississippi, is an agricultural hamlet located in Sunflower County, in the heart of the Mississippi Delta. The City is governed by a mayor and five aldermen. Since 1844, only one black has been elected to public office. All other City officials have been members of the white race.

Appellees filed their suit after Indianola officials failed to respond to a 1980 letter of the United States Attorney General concerning Indianola's past non-compliance with Section 5. They complained that the City allowed white residents of unprecleared annexed areas to vote in municipal elections, and thereby diluted black voting strength. Appellees also claimed that the City refused to annex more than 4,000 potential black voters residing in 11 subdivisions adjacent to the municipal borders because of their race in violation of the 13th, 14th and 15th Amendments. All previously adjacent subdivisions occupied by whites and developed near or about the municipal borders have been annexed by the City. This issue is still pending

before the District Court. *Dotson* v. *City of Indianola* 514 F. Supp. 397 (Three Judge Court) (ND Miss. 1981).

On four separate occasions, 25 May 1965, 4 May 1966, 2 September 1966, and 14 July 1967, Indianola annexed different tracts of adjacent land into the municipal borders. The Voting Rights Act requires that the City preclear these annexations with appropriate federal officials before allowing residents of the newly annexed areas to vote in City elections. *Allen* v. *State Board of Education* 393 U.S. 544 (1969); *Perkins* v. *Matthews* 400 U.S. 379 (1971). The District Court found that the City failed to preclear any of the annexations. The Court concluded that the City violated Section 5 by allowing residents of these areas to vote and run as candidates in municipal elections in 1968, 1969, 1973 and 1977.

In May 1981, the District Court enjoined the City from allowing any persons residing in the annexed areas to vote in the late November and December 1981, municipal elections unless those areas were preclared under the Voting Rights Act.

B.

The Decisions of the District Court and the Attorney General.

In 1975 and 1980, the City failed to respond to inquiries of the United States Attorney General regarding the City's compliance with Section 5. Indianola finally attempted preclearance on 11 March 1981, or more than 6 months after this suit was filed and 16 years after the 1965 annexation. Unknown either to the District Court, the Appellees, or the mayor and the board of aldermen, City Attorney James Robertson advised the Attorney General that the annexations were submitted as a "package." Robertson demanded that the Attorney General of the United States either accepted and preclear all the annexations as a package or reject them all.

In June 1981, the Attorney General timely precleared the annexations of 1966 and 1967 which included only black citizens. An objection was lodged against the 1965 annexation which included only white citizens. The Attorney General ruled the latter annexation had diluted black voting strength from its inception in 1965 to the present. Exercising his discretion, the Attorney General chose to deal with the annexations separately rather than as a package as requested by the City Attorney. Despite the objection, the Attorney General suggested preclearance could be gained upon presentation of a proper single member district plan or annexation of the adjacent black subdivisions. Together, the District Court opinion and the Attorney General's ruling had the total effect of barring citizens of the white annexed areas from continuing to vote in the City elections until preclearance was gained.

Thereafter, Mr. Robertson announced by letter to the District Court, the Attorney General and Appellees' counsel that the City was withdrawing its submission and would not allow persons residing in the precleared black areas to vote in the fall of 1981. Robertson reasoned that the Attorney General's failure to preclear all the annexations as a package violated a condition of the package submission. Robertson claimed, that Indianola's submission was automatically withdrawn upon the Attorney General's objection to the white annexed area. In an August 1981, response the Attorney General reaffirmed his June 1981, decision and advised Indianola that the City had no right to withdraw its submission.

On 2 September 1981, the District Court ordered the City to allow the persons residing in the precleared areas to vote in 1981 elections along with persons residing in the City's 1 November 1964 boundaries. The Court further granted the City until 9 October 1981, to gain additional preclearance for eligible residents of any area to vote or become candidates in the November and December 1981, elections.

C.

Recent Factual Developments Occurring Since Submission of the Jurisdictional Statement.

1981 municipal elections have been held. White Democratic candidates defeated black Independent candidates in an election which is presently being challenged in the Mississippi courts. Other litigation is contemplated as a result of the December 1981 election. There is a distinct possibility that a new election may be ordered as a result of these lawsuits. The municipal borders for future elections may be greatly affected by this Court's decision.

The City continues to refuse to develop either a single member district plan or to annex all the blacks residing adjacent to the city limits. Among their reasons, the City claims that an additional 4,000 blacks will increase the City's black population beyond acceptable levels.

Neither Appellants nor Appellees dispute the excellent statement of facts set forth in the District Court's opinion. Rather than engage in an unnecessarily lengthy and redundant discussion of the facts, the Appellee refers the Court to the detailed findings of the District Court for a more specific factual analysis. Jurisdictional Statement at A3-A-14, *City of Indianola, et al.*, v. *Nelson Dotson, et al.*, No. 81-837 (U.S. November 2, 1981).

ARGUMENT

The decision of the District Court is plainly correct and should be upheld for the reasons that follow.

First, there is no right to judicial review of the Attorney General's rightful exercise of discretion under Section 5 of the Voting Rights Act. As this Court has stated:

> "Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act." *Morris* v *Gressette* 432 U.S. 491, n24 (1977)

Second, Appellants' ultimate and admitted purpose is to limit the pool of available black voters in Indianola. The City claims that the District Court's enforcement of the Attorney General's action improperly diluted white voting strength in Indianola and provided blacks a windfall by increasing the percentage of black voters. This was done by the alleged disenfranchisement of white voters residing in unprecleared areas. It contends that the Court erred when it denied residents of unprecleared white areas the right to participate in future elections while allowing black residents of precleared areas to continue to vote in forthcoming City contests. The District Court halted Indianola's efforts to limit the pool of potential black votes for both constitutional and statutory reasons:

> "[T]he City's request to postpone elections is based solely on its desire to preclude its black citizens from obtaining a 'windfall' advantage in electing candidates of their choice. This justification clearly runs afoul of [the] constitutional proscription against purposeful discrimination." *Nelson Dotson et al.* v. *City of Indianola et al.* No. 80-220-WK-0 (Three Judge Court) (September 2, 1981—N.D. Miss.). Jurisdictional Statement, *supra*, at A21-A22.

Further, the District Court correctly noted that the City sought to deny black citizens residing in precleared areas the right to vote in order to limit the percentage of blacks in Indianola:

> "Electors residing in the areas annexed in 1966 and 1967 clearly should be allowed to vote. The City maintains that although the Attorney General may have precleared these areas, it is under

no obligation to allow electors residing therein to vote, and that it may lawfully revert to the November 1, 1964, city boundaries for voting purposes. This argument must fail for two reasons. First, such action, if taken by the City, would amount to purposeful discrimination on the basis of race and therefore would violate the federal constitution. Indianola may not, in effect, deannex black persons solely because it does not desire to provide the rights entitled to all citizens of a municipality. See *Franklin* v. *City of Marks*, 439 F.2d 665, 670 (5th Cir. 1971). Furthermore, action of such character would itself amount to a voting change since citizens residing in the 1966 and 1967 annexed areas have voted for the past 15 years. Since there no longer exists a federal obstacle to their exercise of the franchise, § 5 would require preclearance before Indianola might lawfully take the position that citizens residing in 1966 and 1967 annexations may no longer be allowed to vote. In rejecting Indianola's assertion that it is free to restrict the electoral base as it may desire, we note the Fifth Circuit's holding in *City of Marks*, *supra*, that "[w]hat might be regarded as a routine municipal ordinance or proceeding in state law is therefore subjected to thorough analysis and examination in federal law when the effect of the ordinance or proceeding is to deprive citizens of their federally protected rights." *Nelson Dotson, et al.* v. *City of Indianola, et al.* No. 80-220-WK-0 (Three Judge Court) (September 2, 1981—N.D. Miss.). Jurisdictional Statement, *supra*, at A20-A21.

The Court, therefore, ruled that any municipal attempt to deny black voters the same right to vote that they had exercised in past elections would be a change that violated Section 5. Indianola had historically allowed persons annexed by process of state law to vote in municipal

elections. The denial of this right would have been a different pattern or practice from that used during the past 16 years.

The City has never challenged this finding.

Third, there is no merit to the Appellants' argument that either the District Court or the Attorney General denied whites their right to vote in violation of any law. Those white persons barred because they resided in unprecleared areas lost a benefit which they were never legally entitled to exercise. For 16 years, they voted unlawfully. Their votes were cast in violation of the 15th Amendment and Section 5 of the Voting Rights Act. The purpose of these laws was to protect the historic victims of discrimination from continued blatant or subtle devices that are calculated to diminish the value of their ballot.

Appellants are neither likely nor legally permissible proponents of Section 5 of the Voting Rights Act or the 15th Amendment. The history of Indianola typifies the experience these laws sought to redress. Since 1844 only one black person has been elected to the governing board of aldermen. No black has ever been elected mayor. Indianola is the founding place of the White Citizens' Council. Whites have always had the right to vote in Indianola while blacks only gained the ballot in 1965. At no time in history has the ever-present *white minority* in Indianola lost effective political control of municipal government, despite an ever-present and often disenfranchised *black majority*. There is no place in America, or the world, where a white majority has been governed for more than 100 years by a black minority. Majority rule has never existed in Indianola for either black or white people.

While these Appellants contend that the Voting Rights Act protects the white Indianola minority, we remind the

Court that for 16 years the City violated the Act with impunity to the benefit of that same white minority.

The City's chosen course of action gave voting rights to a group of citizens who were not then and are not now entitled to exercise the municipal ballot. Sixteen years late the City submitted the annexation for preclearance. When the Attorney General objected to white annexed properties, the City announced it would not allow blacks residing in precleared areas the right to vote. The City refused to follow the Attorney General's suggestions to resolve the problem by annexing 4,000 blacks residing in adjacent areas or by creating single member districts. Finally, the Appellants failed to exhaust their available federal judicial remedies by seeking a declaratory judgment from the United States District Court for the District of Columbia to gain preclearance. Considering the alternatives available, it seems obvious that it is the *City* —and not the District Court, the Attorney General, or the Appellees—that caused numerous white residents to be barred from voting.

VI

CONCLUSION

The arguments made by the Appellants present no substantial question for the decision of this Court. The District Court opinion below is so obviously correct as to warrant no further review. We respectfully request that the appeal should be dismissed or, in the alternative, that the decision of the District Court be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF INDIANOLA, MISSISSIPPI, ET AL.,
APPELLANTS

v.

NELSON DOTSON, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Attorney General's decision to interpose an objection pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, to one of a city's four annexations, but not to the other three, is subject to judicial review, in the circumstances of this case.

2. Whether the district court correctly concluded that the city could not deny residents of the three precleared annexations the rights to vote in a city election.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Indianola, a small city in Sunflower County, Mississippi, is governed by a mayor and a board of five aldermen elected at-large by majority vote. In 1964, the city had a black population majority of 56%. Between 1965 and 1967 the city annexed four adjacent territories. The 1965 annexation added an area inhabited entirely by whites, thereby effecting a substantial dilution of the black vote.[1] The three

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[1] According to the figures employed by the district court, the 1980 population of the pre-1965 boundaries plus the area annexed in 1965 included 4047 whites and 2680 blacks.

subsequent annexations added territory inhabited mainly by blacks, but the net effect was still a small white population majority (J.S. App. A1-A2, A10-A11, A38).

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, requires that covered jurisdictions obtain preclearance of all changes in laws affecting voting that take effect on or after November 1, 1964. If the submitting jurisdiction shows that the change is not racially discriminatory in purpose or effect, preclearance can be secured either from the Attorney General or from a three-judge district court in the District of Columbia. It is established that annexations that add voters to the electorate constitute voting changes within the purview of Section 5. *Perkins* v. *Matthews*, 400 U.S. 379, 388-394 (1971). It is undisputed that Indianola, Mississippi, is a jurisdiction subject to Section 5 of the Voting Rights Act and that, although it had not obtained preclearance, it had been giving effect to its annexations prior to June 1981.

In October 1980, appellees brought this suit seeking, *inter alia*, a declaration under Section 5 of the effect of the uncleared annexations upon the city boundaries to be employed in establishing voter eligibility in the 1981 municipal elections (J.S. App. A28).[2] Apparently responding to the filing of this suit, the appellant city, between March 6 and May 1, 1981, completed its submission of the four, decade and-a-half old annexations to the Attorney General (*id.* at A4-A6). A three-judge district court was convened (see Pet. App. A26-A34, A35-A36). On May 13, 1981, the district court determined that appellants had violated Section 5 by holding municipal elections giving effect to the uncleared annexations (*id.* at A43). The court declined,

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[2]This appeal arises from the district court's disposition of Count I of the complaint. See J.S. App. A27.

however, to order that new elections be conducted immediately, noting the pendency of appellants' submission to the Attorney General, and declaring that appellants could not continue to hold elections based upon uncleared post-annexation boundaries (*id.* at A44-A47).

Citing the substantial dilution of black voting strength effected and a strong history of racial bloc voting, on June 1, 1981, the Attorney General interposed an objection to the 1965 annexation. The other three annexations were cleared. The objection letter explained that the Attorney General had considered treating the four submissions as a "package," as the city's attorney had requested, but had reached the conclusion that he was legally obliged to treat them one at a time.[3] The letter also indicated that Indianola could obtain clearance of the 1965 annexation either by adopting fairly drawn single-member districts or by annexing additional tracts inhabited by blacks so as to offset the dilution of black voting strength effected by the 1965 annexation.[4]

On June 5, 1981, after the objection letter had been issued, the city's attorney wrote to the three-judge court expressing the view that the 1966 and 1967 annexations had been submitted for clearance conditionally, that the Attorney General lacked authority to approve fewer than all of the annexations and that, accordingly, there had been no preclearance of any of the annexations and none of the inhabitants of these areas could vote in the forthcoming city elections (J.S. App. A7). In response, the appellees moved

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[3]A copy of the June 1, 1981, letter of Acting Assistant Attorney General James P. Turner is reproduced as an appendix hereto.

[4]In August 1981 the city set the machinery in motion to annex several tracts inhabited by blacks which would have the effect of restoring the 1964 population balance (J.S. App. A8-A10). The district court decided not to delay the 1981 elections, however (*id.* at A21-A22). We are informed that the Chancery Court refused to approve the annexation.

to have the city officials held in contempt and/or for a new order declaring that the legal boundaries, for purposes of the fall election, included the three precleared annexations. For their part, appellants moved for an order postponing the elections or for a declaration that despite Section 5 clearance, the inhabitants of the three "black annexations" could not vote in the 1981 elections (J.S. App. A2).

The district court found it unnecessary to decide whether appellants had validly conditioned their preclearance submission upon treatment of the four annexations as a package because any such determination would necessarily entail judicial review of the Attorney General's unreviewable exercise of his preclearance authority (J.S. App. A14-A19). In addition, the court held that the residents of the precleared annexations could not be denied the right to vote in the fall elections because appellants' effort to exclude residents of the 1966 and 1967 annexations was racially motivated, and would itself constitute implementation of an uncleared voting change (*id.* at A20-A21).

ARGUMENT

1. Under the Voting Rights Act, the local three-judge court below is assigned the limited role of enforcement of Section 5 by enjoining implementation of changes affecting voting rights that are subject to preclearance but have not been precleared. *Perkins* v. *Matthews, supra,* 400 U.S. at 383-387; *Allen* v. *State Board of Elections,* 393 U.S. 544, 558-559, 561 (1969). The three-judge court's mandate does not extend to consideration of whether a given voting change is impermissibly discriminatory in purpose or effect upon voting rights, *Perkins* v. *Matthews, supra,* 400 U.S. at 385, and does not include review of action taken by the Attorney General in passing upon voting changes. *Morris* v. *Gressette,* 432 U.S. 491 (1977).

Appellants claim that the Attorney General acted improperly by objecting to the 1965 annexation while clearing the 1966 and 1967 annexations, effecting an unlawful and unconstitutional dilution of the white vote. But the 1965 annexation is still open to preclearance in a de novo suit in the United States District Court for the District of Columbia. *Allen* v. *State Board of Elections, supra,* 393 U.S. at 561. The Attorney General's decision to clear the 1966-1967 annexations, which was based upon consideration (*inter alia*) of their impact on the relative voting strengths of black and white voters, is not reviewable. *Morris* v. *Gressette,* 432 U.S. 491 (1977); *Harris* v. *Bell,* 562 F. 2d 772, 774 (D.C. Cir. 1977).[5] Persons claiming to be injured by alleged dilution of the white vote (due to annexation of territory inhabited by black voters) may, like the plaintiffs in *Morris* v. *Gressette, supra,* 432 U.S. at 505-507, secure adjudication of any claim they may possess under the Fifteenth Amendment.[6] Contrary to appellants' suggestion (J.S. 13-15), however, the possibility that such a claim could be asserted does not license the district court to review the Attorney

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[5]Appellants deny (J.S. 10 n.15) that they are seeking review of the Attorney General's preclearance decision and claim that they seek only interpretation of the June 1, 1981, letter. But there can be no serious dispute that the Attorney General objected to the 1965 annexation and cleared the 1966 and 1967 annexations (see J.S. App. A4-A9). Indeed, appellants' statement of the case (see J.S. 8) and formulation of the questions presented (see, *e.g.*, questions nos. 1 and 2) reflect appellants' recognition that the effect of the Attorney General's actions is unmistakeable. The questions tendered for review relate to the Attorney General's authority, rather than to his intentions.

[6]The Jurisdictional Statement seeks to advance a claim that the voting strength of white citizens of Indianola has been unconstitutionally diluted by the decision below (J.S. 13-14). Appellants' suggestion (J.S. 10-11) that the district court decided such a constitutional claim is, however, unfounded. These questions are not properly presented for decision. And appellants, the City of Indianola and its officials, are not properly situated to maintain any such claim; nor would the three-judge court have jurisdiction to entertain such a claim.

General's disposition of their submission. Moreover, contrary to appellants' contention (J.S. 11), the district court did not decide whether the city had effectively conditioned its preclearance submission upon treatment of the four annexations as a package, or whether it had the right to do so.[7] Rather, because the Attorney General had acted upon that submission, and any remedy would necessarily constitute improper review of the Attorney General's action, the district court properly declined to reach those contentions (J.S. App. A14).[8]

2. The district court correctly concluded that the effect of preclearance was to require that the inhabitants of the 1966-1967 annexations be permitted to vote in 1981. Appellants suggest (J.S. 11-12) that while the district court could enjoin implementation of an uncleared change, it could not force the city to implement its annexation of the black areas by allowing those annexees to vote. As the district court observed (J.S. App. A21), however, since the annexations of the black-inhabited areas, voters in those areas had been voting in city elections. Once the annexations were cleared no federal law impediment to their implementation remained. Accordingly, denial of the franchise to persons living in those areas would be a voting change, itself subject to Section 5 preclearance, but not precleared.[9]

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[7]We note that the city had not conditioned the annexations themselves upon preclearance; rather, as appellants conceed (J.S. 6), they had been given effect for a decade and a half without compliance with the Voting Rights Act.

[8]Similarly, contrary to appellants' claim (J.S. 11), the district court did not hold that it lacked authority to defer elections or to order other interim arrangements (see J.S. App. A21).

[9]We express no view as to the legal requirements pertaining to deannexation of previously annexed areas when the annexation had never been submitted for clearance.

CONCLUSION

The judgment below should be summarily affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
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MAY 1982

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Appendix

APPENDIX

JUNE 1, 1981

W. Dean Belk, Esq.
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Indianola, Mississippi 38751

Dear Mr. Belk:

This is in reference to the 1965, 1966 and 1967 annexations to the City of Indianola in Sunflower County, Mississippi, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was completed on May 1, 1981.

The Attorney General does not interpose any objections to the annexations involved in Cause No. 13,624 (May 4, 1966), Cause No. 13,708 (September 2, 1966) and Cause No. 13,952 (July 14, 1967). However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

With respect to the annexations accomplished by Cause No. 13,384 in 1965, however, we cannot reach a like conclusion. To determine that a change in the composition of a city's population resulting from annexation does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, the Attorney General must be satisfied either that the population percentage of the affected minority has not been appreciably reduced and that voting is not along racial lines, or that the city's electoral system nevertheless will afford representation to minority citizens which is reasonably

equivalent to their political strength in the enlarged community. See *City of Richmond* v. *United States,* 422 U.S. 358 (1975), and *City of Rome* v. *United States,* 446 U.S. 156 (1980).

We have given careful consideration to the information provided on the 1965 annexation as well as to comments and information provided by other interested parties. Our analysis reveals that the 1965 annexation occurred when the city's population had become 55.3 percent black and that this annexation of 501 whites diluted the black voting strength at that time by 3.8 percent. The 1,991 whites now residing in those annexed areas have caused a present dilution of 16.1 percent in the 1965 pre-annexation city and even when the post-1965 annexations of 1966 and 1967 are included within the city the present effects of the 1965 annexation amount to a 10.7 percent dilution of the black population. We also note that racial bloc voting exists in the city. With the exception of one black candidate, no black has been elected to the Indianola board of aldermen under the present at-large, majority vote and full-slate features of the city's electoral system even though a substantial number have sought election. Under these circumstances we are unable to conclude, as we must under Section 5, that the 1965 annexation did not have the proscribed discriminatory purpose or effect. Accordingly, I must, on behalf of the Attorney General, interpose an objection to the 1965 annexation.

In limiting our objection to the 1965 annexation, we are not unmindful of the city's request that we preclear none of the annexations here under submission unless we preclear them all. However, the Attorney General's responsibility and authority under Section 5 is to object to those voting changes which are not shown to be nondiscriminatory in purpose or effect. Since our analysis here has found that

showing lacking only with respect to the 1965 annexation that is the only annexation concerning which we have authority to object.

In this connection, should the city adopt an electoral system such as, for example, a fairly drawn single-member district plan, that would afford black voters a realistic opportunity to elect candidates of their choice, the Attorney General would withdraw the objection. Another alternative might be to offset the dilutive effect of the annexation in question by annexing the black residential areas adjacent to the city.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, the Procedures for the Administration of Section 5 (Section 51.44, 46 Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the 1965 annexation legally unenforceable, insofar as it affects voting.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us within twenty days of your receipt of this letter of the course of action the City of Indianola plans to take with respect to

this matter. If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-7439), Director of the Section 5 Unit of the Voting Section.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

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